IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 501

H. E. BYRAM, MARK W. POTTER, AND EDWARD J. BRUNDAGE, AS RECEIVERS, ETC., APPELLANTS,

vs.

A. G. RISTY, CHRIS OLSON, L. E. LARSON, ET AL., ETC., ET AL, APPELLEES.

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BRIEF AND ARGUMENT FOR APPELLANT

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vs

A. G. RISTY, CHRIS OLSON, L. E. LARSON, ET AL., ETC., ET AL.

The appellants, H. E. Byram, Mark W. Potter, and Edward J. Brundage, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, filed their bill in the District Court for the District of South Dakota against A. G. Risty, Chris Olson, L. E. Larson, Fletcher Alguire, and William Stringham, as County Commissioners of Minnehaha County, South Dakota, Dale E. Howe, as County Auditor of Minnehaha County, South Dakota, and Fred A. Mundt, as County Treasurer of Minnehaha County, South Dakota, to enjoin the enforcement of the agricultural land drainage statute of the State of South Dakota upon the ground of the unconstitutionality of such statute. (Transcript pp. 1-94). A motion for an interlocutory injunction was heard before a three-judge court and from the order of that court denying the injunction this appeal is taken to this Court under the provisions of 28 USCA §380. (Transcript pp. 94-136).

The matters in controversy in this suit were before this Court in the cases of *Risty v. Chicago, Rock Island & Pacific Railway Company,* and *Risty v. Chicago, Milwaukee & St. Paul Railway Company,* 270 U. S. 378. In those

cases questions were presented involving the constitutionality of the South Dakota drainage statute but were not passed upon by the Court as the decision was based upon other grounds. Subsequently the Supreme Court of South Dakota in the case of *State v. Risty*, 213 N. W. 952, has declined to follow the decision of this Court in *Risty v. Chicago, Rock Island & Pacific Railway Company*, and has made holdings, in a controversy arising from the same transaction and under the same state of facts, in direct conflict with the decision of this Court. The facts upon which this litigation arise are in brief, as follows:

STATEMENT OF FACTS

At the election in November, 1906, there was adopted an amendment to the constitution of South Dakota which is known as Section 6 of Article XXI of that constitution and which is as follows:

"§6. The drainage of agricultural lands is hereby de-
"clared to be a public purpose and the legislature may
"provide therefor, and may provide for the organization
"of drainage districts for the drainage of lands for any
"public use, and may vest the corporate authorities there-
"of, and the corporate authorities of counties, townships
"and municipalities, with power to construct levees,
"drains and ditches, and to keep in repair all drains,
"ditches and levees heretofore constructed under the laws
"of this state, by special assessments upon the property
"benefited thereby, according to benefits received."

The legislature of South Dakota has never enacted any law to carry into effect the powers conferred upon it by the foregoing constitutional amendment providing for the organization of drainage districts, but has enacted, or attempted to enact, various laws vesting the corporate authorities of the several counties of the state with power to construct levees, drains, and ditches and to keep the same in repair by special assessments upon the property benefited thereby.

The first drainage ditch enactment was Chapter 98 of the Session Laws of South Dakota, 1905, which was passed prior to the adoption of Section 6 of Article XXI of the

South Dakota constitution. After the adoption of that section a new law was passed which is known as Chapter 134 of the Session Laws of South Dakota, 1907. The 1907 law was amended by Chapter 102 of the Session Laws of South Dakota, 1909. The 1907 law was further amended by Chapters 207 and 208 of the Session Laws of South Dakota, 1917. In 1919 the entire drainage law was re-compiled and re-enected as Sections 8458 to 8507, South Dakota Revised Code of 1919. Further amendments were enacted in 1919 which appear as Chapter 46 of the Session Laws of the First Special Session of the Sixteenth Legislature of South Dakota.

The various statutory enactments of the State of South Dakota bearing upon the questions at issue in this suit were contained in "Exhibit A" to the bill of complaint and are to be found in the Transcript of Record, pp. 26-44.

The Big Sioux river has its origin in a lake in the northeastern part of South Dakota and runs thence in a generally southerly direction, and in the eastern part of South Dakota (of which state it is in places the boundary line) for about 100 miles and empties into the Missouri river at a point a short distance north of Sioux City, Iowa. In its course the Big Sioux river passes through the business center of the city of Sioux Falls. It strikes Minnehaha county, in which Sioux Falls is situated, at its north line and flows in a generally southerly direction, but with many bends and curves, for a distance, in a straight line, of twenty-four miles, running in its course two and one-half miles west of the business center of the city of Sioux Falls and south to a point three miles south of the business center. It then flows in an easterly direction for about three miles and then turns north, running through the business center of the city of Sioux Falls and northerly to a point two miles from the business center. It then runs in an easterly direction for several miles when it again resumes its southerly course towards its junction with the Missouri river. The consequence is that at the city of Sioux Falls the river runs like an inverted letter "S," upon the bar of which Sioux Falls is situated. (Transcript pp. 5-6).

From a point about five miles south of where the Big Sioux enters Minnehaha county it runs through a valley or flat from two to four miles in width until it reaches a point about three miles southwest of the business center of the city of Sioux Falls. From there on until it reaches the northeastern portion of the city the river is confined by high banks on either side and with no valley interposing between them. (Transcript pp. 5-7).

There is comparatively little fall between the point where the Big Sioux river enters the flat about fifteen miles north of the city of Sioux Falls and the northeastern section of the city where the river passes over a series of falls of an aggregate height of more than one hundred feet. The result is that the level of the river bed, as it passes over the falls in the northeastern portion of the city of Sioux Falls, is over one hundred feet below the level of the river at a point, four miles to the westward, where it passes to the west of the city of Sioux Falls. (Transcript pp. 5-6).

In December, 1907, the Board of County Commissioners of Minnehaha county, purporting to act under the authority of Chapter 134 Session Laws of South Dakota, 1907, established a drainage ditch known as Drainage Ditch No. 1. This ditch was some three miles in length and extended, from a point on the Big Sioux river below the falls, northward to a point on the flat north of the city of Sioux Falls. In 1910, the Board of County Commissioners established a second ditch, known as Drainage Ditch No. 2, which commenced at the north end of Drainage Ditch No. 1 and extended in a northerly direction for about twelve miles. (Transcript pp. 4-5).

At the point Drainage Ditch No. 1 empties into the Big Sioux river below the falls it passed over a hill in a descent of about one hundred feet. The bottom of the ditch was covered along this descent with concrete, making a spillway through which the water accumulating upon the flats could run to reach the channel of the Big Sioux river below the falls. (Transcript pp. 5-7).

Drainage Ditch No. 1 and Drainage Ditch No. 2 operated more or less successfully in draining the flats until

the spring of 1916 at which time, during a somewhat heavy rainfall, the concrete bottom of Drainage Ditch No. 1, (or its spillway) washed out and the water began cutting a channel through the hill. (Transcript pp. 6-7).

The fact that the concrete spillway had washed out did not in any manner decrease the efficiency of Drainage Ditch No. 1 and Drainage Ditch No. 2 as drainage propositions. In fact, the washout of the spillway made them still more efficient for draining purposes, and if they had been left alone they would very speedily have settled the question of drainage for the lands upon the flats. The effect of the washout was to open a passage for all of the water which accumulated upon the flats into the channel of the Big Sioux river below the falls and this channel was amply sufficient to have taken care of all of the water which ever accumulated upon the flats. In fact, it was a perfect success as a drainage proposition. (Transcript pp. 6-7).

Unfortunately, while Drainage Ditch No. 1, after its spillway was washed out, succeeded in doing all in the way of drainage that the owners of the lands upon the flats desired to have done, it seriously affected other interests. If the water had been allowed to go without hindrance through the new channel it would, within a very short time, have diverted the entire course of the water in the Big Sioux river and would have formed a new channel for the river across the flats north of the city of Sioux Falls, in which channel all of the water coming down the river could have flowed into the channel below the falls without passing around and through the city of Sioux Falls and over the falls, thus cutting off about twelve miles of the river channel. The further effect would have been to destroy the waterpower formed by the dams across the Big Sioux river in the city of Sioux Falls above the falls, as the only water which would have flowed in the Big Sioux river channel through the city of Sioux Falls and over the falls would have been the water from Skunk creek, a tributary of the Big Sioux river, emptying into that stream south of the city of Sioux Falls. Another effect of allowing the river to run through its new channel would have been to destroy the municipal water plant of

the city of Sioux Falls by draining the water from the gravel bed from which the city obtained its water supply. (Transcript pp. 6-7).

After the spillway at the outlet of Drainage Ditch No. 1 had washed out in March, 1916, various plans were proposed looking toward the control of the water which flowed through the ditch.

In October, 1916, the Board of County Commissioners took proceedings by which they attempted to establish a new ditch project which they denominated "Drainage Ditch No. 1 and 2." Thereafter, all proceedings with respect to Drainage Ditch No. 1 and with respect to Drainage Ditch No. 2 were abandoned and all subsequent work was done by the Board of County Commissioners upon the new project, "Drainage Ditch No. 1 and 2." (Transcript pp. 8-9).

The Board of County Commissioners, after organizing Drainage Ditch No. 1 and 2, proceeded to construct additional ditches, cut-offs, and dams in the flats above the city of Sioux Falls, and at the former outlet of Drainage Ditch No. 1, to construct a spillway, and other water retaining works for the purpose of controlling the flow of the water through the ditches. The result was that at the end of the construction period the cost of the work done by the Board of County Commissioners upon Drainage Ditch No. 1 and 2 had amounted to a sum in excess of $250,000, of which upwards of $150,000 was expended upon the spillway and other water retaining works at the outlet of the ditch. For the amount expended, the Board of County Commissioners issued warrants upon the Drainage Ditch No. 1 and 2. These warrants were taken by the laborers and material men employed upon the construction work and were in most instances discounted to the local banks in Minnehaha county. (Transcript pp. 8-12).

After a number of abortive attempts to levy an assessment for the purpose of raising the money to pay the warrants issued for the work done upon Drainage Ditch No. 1 and 2, the Board of County Commissioners, in June, 1921, adopted a notice of time and place for equalizing the proportion of benefits for the construction of the work on

Drainage Ditch No. 1 and 2, in which notice the proportion of benefits assessed against the Chicago, Milwaukee & St. Paul Railway Company was 1681 units out of a proposed total of 32549.62 units. (Transcript pp. 12-14, 89).

The Chicago, Milwaukee & St. Paul Railway Company and five other property-owners brought suits in the District Court for the District of South Dakota to enjoin the making of assessments for the work done upon Drainage Ditch No. 1 and 2. Temporary injunctions were granted *pendente lite*. The defendants named in the several bills were the Board of County Commissioners of Minnehaha County, the Auditor, and the Treasurer of that County. Subsequently, the various banks and other persons holding drainage ditch warrants were granted permission to intervene and became parties to the suits. Upon the hearing of the six suits upon their merits, final decrees were entered enjoining the Board of County Commissioners from making any assessment for the expense of the work done under the proceedings establishing Drainage Ditch No. 1 and 2 upon any property belonging to the various plaintiffs and situated outside of the assessment areas of the original Drainage Ditch No. 1 and the original Drainage Ditch No. 2. The decrees were by their terms without prejudice to the rights of the several plaintiffs to contest any assessment upon property owned by them which had formerly been assessed for Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company v. Risty*, 282 Fed. 364. Transcript pp. 90-94). In these six cases the several plaintiffs attacked the drainage ditch statute of South Dakota as unconstitutional and in violation of the fourteenth amendment to the Constitution of the United States. An attack was also made upon the regularity of the proceedings of the Board of County Commissioners of Minnehaha county under the statute, and questions were raised as to the proper construction to be given to the provisions of the South Dakota drainage statute. In the District Court permanent injunctions were granted to the plaintiffs in all of the six cases. There was, however, a conflict in the various cases as to the status of Drainage Ditch No. 1 and 2. In three of the cases both the plaintiffs and the defendants agreed

that Drainage Ditch No. 1 and 2 was a new and independent drainage ditch proposition, the Chicago, Milwaukee & St. Paul Railway Company being one of the plaintiffs which took this view of the situation. In the other three cases it was contended by the plaintiffs, but denied by the defendants, that Drainage Ditch No. 1 and 2 was merely a maintenance and repair project and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. In the District Court permanent injunctions were granted to the plaintiffs in all of the six cases, and in his opinion filed in the District Court the District Judge took the position that Drainage Ditch No. 1 and 2 was merely a maintenance and repair proposition and a continuation of Drainage Ditch No. 1 and Drainage Ditch No. 2. (*Chicago, Rock Island & Pacific Railway Company v. Risty*, 282 Fed. 364).

Appeals were taken by the defendants and by the intervenors in the six cases to the Circuit Court of Appeals for the Eighth Circuit, in which court the decrees of the District Court were affirmed (*Risty v. Chicago, Rock Island & Pacific Railway Company*, 297 Fed. 710). The defendants and intervenors then took a second appeal to this Court where the decision of the Circuit Court of Appeals was affirmed, (*Risty v. Chicago, Rock Island & Pacific Railway Company*, 270 U. S. 378) in five of the cases.

In the six cases the constitutional objections to the South Dakota drainage ditch statute were urged in the Circuit Court of Appeals. In the opinion in the case, JUDGE KENYON held, "The constitutional questions "raised are grave, serious, and doubtful. Their determi- "nation is not necessary to the solution of these cases. "Therefore under the well established rule that the fed- "eral courts will not pass upon the constitutionality of "statutes unless absolutely necessary, we leave the ques- "tion aside." The Court then proceeded to affirm the decrees of the District Court on other grounds rising upon the construction of the South Dakota statute.

Upon the appeal in the six cases to this Court the question of the unconstitutionality of the South Dakota drainage statute was again urged, but the Court affirmed upon other grounds the decisions of the District Court and Cir-

cuit Court of Appeals in five of the cases, reversing the decree in the case of the *Risty v. City of Sioux Falls,* and ordering the bill in that case dismissed under the authority of *Trenton v. New Jersey,* 262 U. S. 181, and *Pawhuska v. Pawhuska Oil Company,* 250 U. S. 394. In the opinion MR. JUSTICE STONE says, "As our decision in "these cases turns upon the construction and application "of the state law we do not pass upon the constitutional "questions raised. They are, however, questions of sub- "stance and sufficient to give the court jurisdiction to pass "on the whole case." (*Risty v. Chicago, Rock Island & Pacific Railway Company,* 270 U. S. 378).

After the decision of this Court in *Risty v. Chicago, Milwaukee & St. Paul Railway Company,* 270 U. S. 378, the Supreme Court of South Dakota saw fit to take original jurisdiction of a suit brought in the name of the State of South Dakota against the Board of County Commissioners of Minnehaha county and involving an assessment upon property belonging to the state of South Dakota for the same drainage ditch construction work involved in the case of *Risty v. Chicago, Milwaukee & St. Paul Railway Company,* 270 U. S. 378 and involved in the case at bar. The decision of the Supreme Court of South Dakota in this case is reported as *State v. Risty,* 213 N. W. 952. The Supreme Court of South Dakota declined to follow the decision of this Court in *Risty v. Chicago, Milwaukee & St. St. Paul Railway Company,* 270 U. S. 378, and held that notwithstanding that decision it would proceed to construe the South Dakota statutes as it saw fit. In its opinion, the Supreme Court of South Dakota uses the following language:

"We are not unmindful of the decision of the Supreme "Court of the United States in the case of *A. G. Risty et "al. v. Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378, 46 S. Ct. "236, 70 L. Ed. 641, which court had under consideration "this same project, and although this court will give to "such decision most respectful consideration, yet, in cases "not arising upon the construction of the federal Consti- "tution or laws of the federal government, this court has "full jurisdiction and can adopt its own construction of "the state statutes even though such construction be at

"variance with the construction placed upon them by the "Supreme Court of the United States.

"That court recognized the full meaning of section "8458, R. C., but overlooked the connection between that "section and section 8476 and gave an improper inter- "pretation to section 8467. This latter section does not "apply to assessments for costs of maintenance of an old "ditch."

On June 23, 1927, the Appellants filed their bill of complaint in the District Court of the United States for the Southern Division of the District of South Dakota, against the County Commissioners, the County Auditor and the County Treasurer of Minnehaha county, South Dakota, praying for an injunction against the making of any apportionment of benefits or assessment upon the property of the Chicago, Milwaukee & St. Paul Railway for the payment of the costs of the drainage construction works in Drainage Ditch No. 1 and 2, upon the ground of the unconstitutionality of the South Dakota drainage statute. A motion for an interlocutory injunction was made by the plaintiffs and notice of the hearing upon such motion served upon the defendants and upon the Governor and the Attorney General of the State of South Dakota. An application was duly made to the District Judge to convene a three-judge court as provided by 28 USCA §380. The motion for an interlocutory injunction was heard by the three-judge court and an order entered denying the injunction. From this order this appeal is taken to this Court. (Transcript pp. 94-137).

The foregoing being the facts involved in this suit, we submit on behalf of the appellants the following

SPECIFICATION OF ERRORS.

Appellants specify the following errors relied upon on this appeal:

First. That the United States District Court, for the District of South Dakota, composed of the following: Honorable Wilbur F. Booth, Circuit Judge, and the Honorable James D. Elliott and the Honorable George C. Scott, District Judges, erred in overruling the motion of plaintiffs and appellants for the issuance of an interlocutory injunction.

Second. That said Court erred in not granting an interlocutory injunction as prayed in the bill of complaint and as asked by plaintiffs and appellants in their motion for said injunction.

Third. That the Court erred in holding that the drainage statute of the State of South Dakota, to-wit, Chapter 98 of the Session Laws of 1905 of the State of South Dakota, as amended and reenacted as Chapter 134 of the Session Laws of 1907 of the State of South Dakota, and as amended and reenacted as Sections 8458 to 8491 of the South Dakota Revised Code of 1919, and as amended at the Second Special Session of the Sixteenth Legislature of the State of South Dakota, is not in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF AND ARGUMENT

I.

THE DRAINAGE STATUTE OF SOUTH DAKOTA IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT NO OPPORTUNITY IS GIVEN THE PROPERTY-OWNER TO BE HEARD AS TO HIS INCLUSION IN THE DRAINAGE ASSESSMENT AREA BEFORE THE CONSTRUCTION OF THE DRAINAGE WORK.

The first proposition which we desire to present for the consideration of the Court is that the entire South Dakota drainage law is unconstitutional as being in violation of the "due process of law" clause of the Fourteenth Amendment. The consideration of this question involves an analysis of the provisions of the South Dakota drainage statute as it existed at the time the Board of County Commissioners of Minnehaha county attempted to establish Drainage Ditch No. 1 and 2, and did the work thereunder. In considering this proposition it must at all times be borne in mind that all of the work, the cost of which was upwards of $250,000, was done by the Board of County Commissioners before any attempt was made to determine the property-owners, or property, upon which an apportionment of benefits, or an assessment was ultimately to be made to defray the cost. The South Dakota drainage statute was made an exhibit to the bill of complaint and appears *in extenso* in the transcript of record. (Transcript pp. 26-44).

The first statutory step in the establishment of a drainage ditch is the filing of a petition. (§2, ch. 134, Laws of 1907; §8459, R. S. 1919, Transcript p 27). This petition must "set forth the necessity for the drainage, "a description of the proposed route by its initial and "terminal points and its general course, or by its exact "course in whole or in part, and a *general statement of "the territory likely to be affected thereby.*" It will be noticed that in the petition, which is the initial and jurisdictional step in the formation of a drainage ditch, it is

not necessary to include a description of the property which will be affected and upon which assessments will be levied to pay the costs of the construction of the ditch. All that is required is a "general statement of the terri- "tory likely to be affected thereby." The next step in the proceeding is for the County Auditor to transmit a copy of the petition to the State Engineer, who, together with the Board of County Commissioners is required to inspect the proposed route and "if in the opinion of the Board "and the State Engineer it is necessary," the Board of County Commissioners causes a survey of the proposed drainage to be made by a competent engineer, selected by the Board, but under the general supervision of the State Engineer. This survey is primarily for the purpose of aiding the Board in determining the necessity for the proposed drainage but it may be a complete survey such as will be required for the construction of the drainage and the assessment of its cost. All this is within the jurisdiction of the Board of County Commissioners. The survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. (§3, ch. 134, Laws of 1907; §1, ch. 102, Laws of 1909; §8460, R. S., 1919, Transcript pp. 27-28). While the survey may, at the option of the Board of County Commissioners, be a complete survey for the purpose of ascertaining all facts required for the construction of the proposed drainage and the assessment of its cost, such complete survey is not rendered obligatory by the statute and the Board of County Commissioners may have made only so much of the survey as may be necessary to determine the necessity for the proposed drainage.

After receiving the report of the surveyor, the Board of County Commissioners is required to determine the "exact line and width of the ditch, if the same shall not "be fixed in the petition, and shall file its determination "with the petition." The Board then fixes the time and place for the hearing of the petition and gives notice by publication in a newspaper for two weeks and by posting

copies of the notice in three public places near the route of the proposed drainage. The notice "shall describe the "route of the proposed drainage and the tract of country "likely to be affected thereby in general terms, the sep- "arate tracts of land through which the proposed drain- "age will pass and give the names of the owners thereof "as appears from the records of the office of the Regis- "ter of Deeds on the date of the filing of the petition, "and shall refer to the files in the proceeding for further "particulars." The notice shall also "summon *all per- "sons affected* by the proposed drainage to appear at "such hearing and show cause why the proposed drain- "age shall not be established and constructed." (§4, ch. 134, Laws of 1907; §2, ch. 102, Laws of 1909; §8461, R. S. 1919, Transcript pp. 28-29). This notice is *the only notice given to property owners prior to the establishment of a drainage ditch and is the only notice under which the Board can acquire jurisdiction to make an assessment.* The owners are named of the separate tracts of land through which the proposed drainage will pass but no description is given of the property *affected by the proposed drainage ditch or which will be assessed for the cost of the construction thereof.* The notice merely describes the route of the proposed drainage and the "tract "of country likely to be affected thereby *in general "terms"* and then summons "*all persons affected by the "proposed drainage*" to appear at the hearing. A notice designating as the tract of country "likely to be affected "thereby in general terms" would be sufficient if it named as such "tract of country" the entire county in which the drainage ditch is to be constructed. Nothing whatever is required in the notice by which any property owner, other than one owning land through which the ditch is to be constructed, is apprised that he is affected or that his land will be assessed for the construction of the proposed drainage ditch. In fact, all that the South Dakota laws requires is for the Board of County Commissioners of a South Dakota county to publish and post a general notice summoning "all persons affected" to appear at the hearing, in order to support an assessment, for the construction of the ditch, upon all of the real property situated within the county limits. There is ab-

solutely nothing in the statutory notice to inform any property owner that he will be called upon to pay an assessment. After the ditch is constructed, the Board of County Commissioners is at liberty, under the South Dakota statute, to extend the assessment to all property in every direction up to the county boundary lines. If this be sufficient notice, then after it is given, the Board of County Commissioners has the power to assess for the cost of the construction of any ditch every acre of property within the county limits.

At the hearing upon the petition, the South Dakota statute kindly permits "any person interested" to appear and contest the statements of the petition and matters set forth in the surveyor's report and the finding of the Board as to the width and route of the proposed ditch. After the hearing, the County Board may establish the drainage ditch. (§5, ch. 134, Laws of 1907; §3, ch. 102, Laws of 1909; §8462, R. S. 1919. Transcript pp. 29-30).

After the establishment of the drainage ditch, the Board of County Commissioners "shall fix the proportion of "benefits of the proposed drainage among the lands af- "fected and shall appoint a time and place for equaliz- "ing the same." (§6, ch. 134, Laws of 1907; §4, ch. 102, Laws of 1909; §8463, R. S. 1919. Transcript pp. 30-31). There is no statutory requirement as to how soon after the establishment of the drainage ditch this shall be done and it is not necessary that it be done before the drainage project has been completed. It must be done before an assssment is made for the purpose of paying the cost of the construction of the drainage project but the assessment, when made, includes all costs already incurred, or thereafter to be incurred. (§7, ch. 134, Laws of 1907; §5, ch. 102, Laws of 1909; ch. 130, Laws of 1911; §8464, R. S. 1919. Transcript pp. 31-33).

The notice of equalization of proportion of benefits is given by publication once in each week for two consecutive weeks in a newspaper of the county and by posting copies of the notice in three public places near the route of the proposed drainage. The law requires that the "notice shall state the route and the width of the drainage "established, a description of each tract of land affected

"by the proposed drainage and the names of the owners "of the several tracts of land as appears from the rec- "ords of the office of the Register of Deeds, at the date "of filing of the petition, and the proportion of benefits "fixed by each tract of property, taking any particular "tract as a unit, and shall notify all such owners to show "cause why the proportion of benefits shall not be fixed "as stated." (§6, ch. 134, Laws of 1907; §4, ch. 102, Laws of 1909; §8463, R. S. 1919. Transcript pp. 30-31). Here for the first time there is published a description of each tract of land "affected" by the proposed drainage and the names of the owners of such tracts. As in the case at bar, the work may have been completed and an expense of over a quarter of a million dollars incurred before the Board of County Commissioners determines what particular lands are "affected" by the proposed drainage and gives notice to the owners of such lands. A property owner then for the first time notified that his land is "affected" by the proposed drainage has no right to object in any manner to the establishment of the drainage project. He has nothing to say in regard to its manner or cost of construction; he has no voice in the selection of the particular tract of land taken as a unit; and all concerning which he can be heard is as to whether the proportion of benefits "shall not be fixed as stated."

It is now too late for the property owner to escape. He is like a rat in a trap. All that he can do is to appear before the Board of County Commissioners and object to the proportion of benefits which has been assessed against him and ask to have that proportion reduced by raising the proportion of some other property owner. He is precluded from raising any question whatsoever as to the right to include his property within the drainage area. He has nothing to say as to the necessity for the drainage project or as to the manner of construction or its cost. Without any notice, either personal or constructive, his property has been included in the drainage area under the general proclamation of the Board of County Commissioners and he has no redress. The property owner cannot question the validity of the proceedings. All that is left for him to do is to pay.

Our contention is that the South Dakota drainage statute is in violation of the due process of law clause of the fourteenth amendment to the federal constitution for the reason that no opportunity is given a property owner, whose property is "affected" by the proposed drainage project, to appear prior to the doing of the work and the making of the assessment for the construction cost.

In *State of South Dakota v. Risty,* 213 N. W. 952 (p. 959), the Supreme Court of South Dakota attempts to reason away the necessity for giving notice to property owners, whose property will be included within the assessment area, before the assessment area is determined and the work performed, in the following language:

"It is contended by defendants that this notice is suf-
"ficient to comply with the due-process clause of the
"state and federal constitutions. And with this conten-
"tion we agree. At the hearing held pursuant to this
"notice, an interested party may appear and show any
"reason why his property should not be assessed that he
"could have shown at the hearing for determining wheth-
"er the drainage should be established. If his property
"will not be benefited by the establishment of the drain-
"age this may be shown at either hearing, and if shown
"at either hearing his property will not be assessed.

"This precise question has been the subject of much
"litigation in other courts, and it seems to be the con-
"census of opinion that if the property owner is brought
"in and given an opportunity to be heard at any time
"before the apportionment finally becomes a lien against
"his property his constitutional right has not been in-
"vaded."

The fallacy of the reasoning of the South Dakota Supreme Court is evident when the fact is taken into consideration that under the South Dakota drainage statute the Board of County Commissioners is permitted, as was done in the case at bar, to expend more than a quarter of a million of dollars in the construction of drainage works before any notice is given to property owners that

their property will be assessed to defray the cost of the improvement.

An examination of the decisions of this and of other courts will, we believe, disclose the fact that the Supreme Court of South Dakota stands alone in its holding upon this proposition. In every other case in which a board is authorized by law to establish an assessment district and make improvements to be paid for by assessment upon the property within the district, the courts have uniformly held that notice must, in the first instance, be given to the property owners before the assessment area is determined and the construction work entered upon.

The situation in the case at bar is radically different from that in the case of *Spencer v. Merchant*, 125 U. S. 345, and in the line of cases following that decision. In all such cases the legislature created the assessment district and thereby designated what property should be assessed. That the legislature possesses the power to establish an assessment district, the property within which is to be assessed for the making of a special, or local improvement, is well settled.

In the case at bar the legislature of South Dakota did not see fit to establish the assessment district of Drainage Ditch No. 1 and 2, but that assessment area was established by the Board of County Commissioners of Minnehaha county under the provisions of the South Dakota drainage statute, and that statute does not require notice to be given to the property owners before the assessment area is determined and the construction work undertaken.

The distinction between cases in which the assessment district is established by the legislature and those in which it is formed by action of some administrative board was considered by this Court in *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112. In the very elaborate opinion in this case the Court (p. 167) says:

"The legislature not having itself described the dis-
"trict, has not decided that any particular land would
"or could possibly be benefited as described, and, there-
"fore, it would be necessary to give a hearing at some

"time to those interested upon the question of fact wheth-
"er or not the land of any owner which was intended to
"be included would be benefited by the irrigation pro-
"posed. If such a hearing were provided for by the act,
"the decision of the tribunal thereby created would be
"sufficient. Whether it is provided for will be discussed
"when we come to the question of the proper construction
"of the act itself."

Later on in the opinion the Court discusses the question whether the statute under consideration in that case does provide for a hearing prior to the formation of the district and holds, that under the statute the right of hearing is given to the property owner prior to the formation of the district. An examination of the California statute involved discloses the fact that it differs materially from the South Dakota statute in that the petition for the formation of the assessment district must "particu-
"larly describe the proposed boundaries of such dis-
"tricts" and the petition itself must be published. After the petition is published and has been passed upon by the Board of Supervisors, the question of the formation of the irrigation district is submitted to an election of the electors of the district who are also freeholders. (*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, pp. 116-117). These facts differentiate the statute passed upon in *Fallbrook Irrigation District v. Bradley* from the South Dakota statute under consideration. Under the California statute the boundaries of the proposed district are fixed in the first instance and after they have been determined then the question of the formation of the district is put to a vote of the freeholder electors. We submit therefore, that the decision in *Fallbrook Irrigation District v. Bradley* is a distinct authority in favor of our position that the South Dakota drainage statute is unconstitutional. The court expressly determines in that case that notice must be given to the property owner of the formation of the district *before his property can be included in it*, and one of the requisites of notice is that the property owner be advised in some manner, either actually or constructively, that his land will be included within the limits of the proposed project.

Another case in which the distinction is recognized between an assessment district established by the legislature and one established by the action of some administrative board or other authority is *Embree v. Kansas City Road District*, 240 U. S. 242. The Court in the opinion (pp. 246-248) says:

"The district was not established or defined by the legislature, but by an order of the county court made under a general law. Whether there was need for the district and, if so, what lands should be included and what excluded was committed to the judgment and discretion of that court subject to these qualifications: First, that the district should contain at least 640 acres of contiguous land and be wholly within the county; second, that the court's action should be invoked by a petition signed by the owners of a majority of the acres in the proposed district, and, third, that public notice—conceded to be adequate—should be given, by the clerk of the court, of the presentation of the petition and the date when it would be considered, and that owners of land within the proposed district should be accorded an opportunity to appear, either collectively or separately, and oppose its formation. In this connection the statute says: 'The court shall hear such petition and remonstrance, and shall make such change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a preliminary order establishing such public road district, and such order shall set out the boundaries of such district as established . . . . but the boundaries of no district shall be so changed as to embrace any land not included in the notice made by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing and is notified in open court of such fact and given an opportunity to file or join in a remonstrance.' The order actually made shows that four of the present plaintiffs, with three others, appeared in opposition to the petition, recites that 'the court, after hearing and

"considering said petition and said protests and remon-
"strances and all evidence offered in support thereof,
"finds that the public good requires and makes necessary
"the organization, formation and creation of such pro-
"posed public road district . . . . with boundaries as
"stated in said petition,' and sets out the boundaries of
"the district as established.

"The sole purpose in creating the district, as the stat-
"ute shows, was to accomplish the improvement of public
"roads therein—the particular roads to be designated by
"the district commissioners and an approving vote of the
"land owners.

"As the district was not established by the legislature
"but by an exercise of delegated authority, there was no
"legislative decision that its location, boundaries and
"needs were such that the lands therein would be bene-
"fited by its creation and what it was intended to accom-
"plish, and, this being so, it was essential to due process
"of law that the land owners be accorded an opportunity
"to be heard upon the question whether their lands would
"be thus benefited. If the statute provided for such a
"hearing, the decision of the designated tribunal would
"be sufficient, unless made fraudulently or in bad faith.
"*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112,
"174-175.

"Did the statute contemplate such a hearing? We
"have seen that it required that adequate public notice
"be given of the presentation of the petition for the
"creation of the district and the time when it would be
"considered, made provision for the presentation of re-
"monstrances by owners of lands within the proposed
"district, and directed that the petition and remonstrances
"be heard by the county court, that the court make such
"change in the boundaries 'as the public good may re-
"quire' and that the boundaries be not enlarged unless
"the owners of the lands not before included consent in
"writing or appear at the hearing and be given an op-
"portunity to present objections. That a hearing of
"some kind was contemplated is obvious, and conceded."

It will thus be seen that the statute under considera-

tion in *Embree v. Kansas City Road District* differed from the South Dakota drainage statute in that the petition for the formation of the district specified what lands should be included within the boundaries of the proposed district. The South Dakota statute is absolutely wanting in any such requirement.

The case of *Soliah v. Heskin*, 222 U. S. 522, arose under the North Dakota drainage law. An examination of the North Dakota statute, upon which the case arose, discloses the fact that the North Dakota law was not subject to the same objections which are urged against the South Dakota enactment.

Under the North Dakota statute, a petition for the construction of the drain is filed with the board of drain commissioners. This petition designates the starting point and terminus and general course of the proposed drain. The board of drain commissioners then employs surveyors who prepare profiles, plans and specifications of the proposed drain, an estimate of the cost thereof, and a map or plat of the lands to be drained in duplicate, showing the regular sub-divisions thereof, one copy of which is filed in the office of the county auditor in the county in which the drain is proposed to be constructed and the other with the board of drain commissioners, subject to inspection. Upon the filing of the surveyor's report, the board of drain commissioners fixes a date and public place for hearing objections to the petitions and gives notice of such hearing. The notices must contain a copy of the petition and a statement of the date of filing of the surveyor's report and the date when the board will act upon the petition, must be signed by a majority of the members of the drainage board and "shall be sent by "registered mail to the last known address of each and "every *owner of land which may be affected* by the pro-"posed drain." The North Dakota statute therefore requires that the names of "each and every owner of land "which may be affected" be determined and actual notice given these at the very inception of the project and this notice must be given by sending to each owner a copy of the petition and of a statement of the date of filing the surveyor's report and the date upon which the board will

act upon the petition. That is a very different proposition from merely publishing a notice "to all persons whose "property is affected" without first determining who are affected, as required by the South Dakota statute. The opinion in the case of *Soliah v. Heskin* must consequently be read in the light of the North Dakota statute which provides for the giving of notice at two stages of the proceedings to the property owner, first, a notice before the drainage district is formed, and, second, a notice when the assessment of benefits is made. The North Dakota statute provides exactly the thing for the want of which the South Dakota statute is unconstitutional.

The case of *Milheim v. Moffat Tunnel District*, 262 U. S. 710, is clearly to be distinguished from the case at bar. It is a case arising upon an assessment made in a taxing district the limits of which had been fixed by act of the legislature of the state of Colorado, and the Court followed the rule laid down in *Spencer v. Merchant*, 125 U. S. 345, that the legislative authority of the state extends to the formation of taxing districts, and that a state legislature can enact a law fixing the boundaries of a taxing district without giving notice to the owners of property included therein. That is an entirely different proposition from the one arising under the South Dakota drainage law which on its face does not attempt to form a taxing district by legislative enactment. The case of *Voight v. Detroit City*, 184 U. S. 115, is one of a line of cases involving the making of special assessments in cities for various municipal purposes, as is also *St. Louis Land Company v. Kansas City*, 241 U. S. 419. In this line of cases the courts hold that cities organized under general laws or special acts of the legislature may impose special assessments under general statutes authorizing the levying of assessments in proportion to benefits. In all such cases it is held by the courts that some opportunity must be given the taxpayer to be heard as to the proportion of benefits to be assessed against his property, but the property owner is not entitled to a hearing upon a determination of the question whether the improvements are to be made for which the special assessment is levied. That doctrine, however, does not apply to cases in which the

taxing district is not established by legislative enactment but is formed by the action of some administrative board.

The South Dakota drainage statute makes no provision for the giving of notice to the property owners interested prior to the formation of the drainage assessment area and the doing of the drainage construction work, excepting the blanket notice provided by Section 8461, Revised Code, 1919, to "all persons affected." The limits of the proposed drainage assessment area are not determined until after the improvement work has been completed and, until after the work has been completed and the expense thereof incurred, there is no statutory provision whereby any property owner is given notice that his property will be included within the assessment area.

To be sure, the Supreme Court of South Dakota in *State v. Risty*, 213 N. W. 952, holds that at the hearing for the apportionment of benefits had after the construction work has been completed "an interested party may "appear and show any reason why his property should "not be assessed that he could have shown at the hear- "ing for determining whether the drainage should be es- "tablished. If his property will not be benefited by the "establishment of the drainage this may be shown at "either hearing, and if shown at either hearing his prop- "erty will not be assessed." This might be sound law if, under the South Dakota statute, the hearing upon the apportionment of benefits was had prior to the making of the improvement. It is verging upon the absurd to say that the rights of a property owner can be fully preserved by an appearance after the improvement work has been completed. He certainly is deprived of his right to object to the making of the improvement, to the formation of an assessment area, and to the inclusion of his property therein. The only thing that is left to him is to show either that his property is not benefited at all or that it is not benefited to the extent determined by the Board of County Commissioners in the tentative apportionment of benefits. Regardless of the holdings of the Supreme Court of the state of South Dakota in *State v. Risty*, he is absolutely deprived of any right to object to

the making of the improvement or to the inclusion of his property within the assessment area.

In our investigation of this subject we have examined the statutes of many states respecting the formation of drainage districts and the making of improvements and the payment therefor by special assessments. In practically every instance the first step which the statute requires is that the limits of the proposed improvement district be defined, and the next step is to give notice to the property owners interested in the proposed assessment area. It is not until after the area has been definitely determined and notice given that the improvement work is entered upon. After the work is completed then the benefits to the various tracts of property in the assessment area are determined and the assessment to defray the expense of the work is spread.

We are unable to find any statute, other than that of South Dakota, in which the improvement work is entered upon and the expense thereof incurred prior to the determination of the limits of the assessment area, and it is this defect in the statute that renders it, as we contend, unconstitutional in that it operates to take property without due process of law contrary to the fourteenth amendment to the Constitution. We submit that such a statute is in clear violation of the doctrines laid down by this Court in many cases.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

Embree v. Kansas City Road District, 240 U. S. 242.

Soliah v. Heskin, 222 U. S. 522.

Central of Georgia Railway Company v. Wright, 207 U. S. 127.

Londoner v. Denver, 210 U. S. 373.

Turner v. Wade, 254 U. S. 64.

Myles Salt Company, Ltd. v. Iberia Drainage District, 239 U. S. 478.

Browning v. Hooper, 269 U. S. 396.

The sole question involved in this case is that of the constitutionality of the South Dakota drainage statute. The Supreme Court of South Dakota in *State v. Risty*, 213 N. W. 952, has labored hard to place a construction upon the statute which would sustain its constitutionality, but the constitutional objections still remain firmly imbedded in it. The statute permits a board of county commissioners to enter upon a drainage project, without limit as to the amount of money which shall be expended upon it and without first determining what property shall be assessed to pay the cost of the work done. A petition is filed asking that certain drainage works be constructed. The petition does not define the limits of the proposed improvement district, nor does it specify in any manner the properties against which the cost of the work is to be assessed. A blanket notice is then published directed to "all persons affected." The Board of County Commissioners then proceeds to construct the drainage works with no limitation whatever as to the character or the extent of the work or the expense. After the work has been done and the money expended, then for the first time the Board of County Commissioners chooses certain properties against which it makes a tentative apportionment of benefits to form a basis for an assessment for the payment of the cost of the construction work. Then for the first time a property owner is notified that he is expected to pay an assessment and his relief is limited to the right to show either that his property is not benefited at all or that it is benefited to a less degree than determined by the Board of County Commissioners.

We contend that due process of law requires that, in the first instance, before the drainage area is determined and before the improvement work is entered upon, the property owner have a right to be heard both as to the making of the improvement and as to the inclusion of his property in the improvement area.

As we have said, the drainage statute of South Dakota is unique and is unlike any other drainage statute in that, in all other statutes, the improvement area is determined before the improvement work is entered upon and an opportunity is given the property owner to be heard upon the

question of the making of the improvement and also upon the question of the inclusion of his property within the assessment area formed to pay for the improvement. As was said by Judge KENYON in *Risty v. Chicago, Rock Island & Pacific Railway Company,* 297 Fed. 710, "the "constitutional questions raised are grave, serious, and "doubtful" and, as was said by Mr. JUSTICE STONE in *Risty v. Chicago, Rock Island & Pacific Railway Company,* 270 U. S. 378, the constitutional questions raised are "questions of substance." These questions are again presented to this Court and in the present case there are involved no questions of the construction of the South Dakota state statutes upon which the decision in this case can turn. The only question involved upon this appeal is as to the constitutionality of the South Dakota drainage statute, and we respectfully submit that this statute is clearly in violation of the due process of law clause of the fourteenth amendment to the Constitution.

II.

THE DRAINAGE STATUTE OF SOUTH DAKOTA IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION SO FAR AS THE SAME APPLIES TO RAILROAD COMPANIES.

In the preceding discussion of the South Dakota drainage law we have considered the subject of the notice required by the statute to be given to property owners in general. It is our contention that the statute is unconstitutional for the reason that it does not provide for the giving of proper notice to property owners before the area of the improvement district is determined and the improvement work entered upon. In the case at bar, the complaining property owners are the Receivers of a railroad company and we make the further contention that, even if the South Dakota drainage statute should be held constitutional so far as ordinary property owners are concerned, it is still so defective as to render it unconstitutional so far as respects railroad companies. We now desire to call the attention of the Court to the provisions (or want of provisions) in the statute relating to notice to be given to railroad companies.

So far as concerns the statutory provisions relating to the notice to be given before a drainage project is entered upon by the Board of County Commissioners under the South Dakota drainage law, there is no difference as respects railroads and other property owners. The only notice, as has been seen, is a general notice to all persons "affected" by the proposed drainage project.

When we come to the matter of the notice given for the equalization of benefits, a singular situation is presented by the provisions of the statute in, that, while the law provides for the publication of a notice to the owners of land, there is no provision whatever for the publication of any notice to railroad companies.

The provisions respecting the notice to be given of the equalization of proportion of benefits is found in Section 8463, South Dakota Revised Code, 1919 (Transcript pp. 30-31). This section was evidently originally drafted for the purpose of providing a method for the equalization of assessments upon agricultural lands. The method, provided by the statute, for arriving at the assessment and equalization of benefits, is to take some "particular tract as a unit" and then with this tract as a measuring stick to determine, in number of units, the benefits received by the remaining tracts of land. This system is one which is in its nature applicable to agricultural lands, but which cannot well be applied to other classes of property, such as railroads and the property of municipalities. In the case of railroads, the taking of a particular tract of land as the unit, or measuring stick, cannot be made to work out successfully unless the taxing authorities are content to assess railroads merely by virtue of the railroad ownership of the tracts of land comprised in the right of way within the assessment area. In other words, the only way in which the proportion of benefits to railroad property could be determined, under the system provided by the statute, would be to consider merely the area of the right of way and proportion benefits to it the same as to the other agricultural land within the assessment area.

Evidently the legislature, in enacting the South Dakota

drainage law, was not satisfied to have railroad companies pay assessments for the construction of drainage works upon the same basis as the owners of agricultural lands, and in enacting Section 8463, South Dakota Revised Code, 1919, after providing the method for the assessment of the proportion of benefits upon lands by selecting some particular tract as a unit, there are added to the Section (something in the nature of an afterthought) the clause, "the proportion of benefits which any county, city, town "or township may obtain by the construction of such "drainage to highways or otherwise, and *the benefits "which any railroad company may obtain for its prop-"erty by such construction, shall* be fixed and equalized "together with the proportion of benefits to tracts of "land." No method of arriving at the assessment and equalization is provided by the statute. The "particular "tract as a unit" system is self-evidently inapplicable in such cases but the legislature has provided nothing to take its place. The law gives the Board of County Commissioners the naked power to fix and equalize the proportion of benefits to counties, cities, towns, townships, and railroad companies, but provides no method upon which the assessment and equalization can be based.

The notice of equalization of proportion of benefits, provided by Section 8463, "shall state the route and "width of the drainage established, a description of each "tract of land affected by the proposed drainage and the "names of the owners of the several tracts of land as "appears from the records of the office of the Register "of Deeds, at the date of the filing of the petition, and "the proportion of benefits fixed for each tract of prop-"erty, taking any particular tract as a unit, and shall "notify all such owners to show cause why the propor-"tion of benefits shall not be fixed as stated." This is a notice directed solely to the owners of tracts of land within the assessment area. It does not purport to be a notice to a railroad company respecting the assessment or the equalization of proportion of benefits upon the property belonging to such organization. The statute authorizes the Board of County Commissioners to assess the "proportion of benefits" which any person, county, city, town or township may obtain by the construction

of drainage. With respect to railroad companies, the statute authorizes the Board of County Commissioners to "fix and equalize" the "benefits," but seems to make a distinction between railroad property and other classes of property by using the words "proportion of benefits" with respect to other property, but the term "benefits" with respect to railroad property. This would seem to indicate that it was not the intent of the legislature that railroad companies should be assessed in the same proportionate manner as are agricultural lands, or as are counties, cities, towns or townships.

The fact, however, remains that the legislature of South Dakota has made no provision whatever for the giving of notice to railroad companies, of the assessment or equalization of benefits supposed to be derived from the construction of drainage works. It consequently follows that as far as railroad companies are concerned, the statute provides for no notice whatever, at any stage of the proceeding, of the apportionment of benefits of the assessment. Even if the South Dakota drainage statute should be held valid as far as respects the matter of notice to the owners of agricultural lands, it is clearly unconstitutional as to railroads and municipalities by reason of its failure to provide for any notice whatever at any stage of the proceedings. It clearly comes within the inhibition of the Fourteenth Amendment and within the doctrine laid down by the Supreme Court in numerous cases.

Central of Georgia Railway Company v. Wright, 207 U. S. 127.

Londoner v. Denver, 210 U. S. 373.

Soliah v. Heskin, 222 U. S. 522.

Turner v. Wade, 254 U. S. 64.

Road Improvement District v. Missouri Pacific Railroad Co., 274 U. S. 188.

It will be observed in passing that the provisions of the South Dakota drainage statute with respect to the apportionment of benefits to railroad companies and the making of assessments upon such companies is in no manner

involved in the decision of the Supreme Court of South Dakota in *State v. Risty,* 213 N. W. 952, and this Court is consequently in no manner bound by any holding upon the subject of the Supreme Court of South Dakota.

The South Dakota drainage statute having failed to provide for the giving of any notice at any stage of the proceedings prior to the time the tax became absolute to railroad companies, any assessment or tax imposed upon such corporations under the statute is without due process of law and void. The statute is also defective in that, while it provides for the determination by the Board of County Commissioners of the "proportion of benefits" which any private property owner, or any county, city, town or township, may obtain by the construction of the drainage, it is required to ascertain "the benefits" which any railroad company may obtain for its property by such construct, and such benefits "shall be fixed and equalized together with the proportion of benefits to tracts of land." In other words, railroads are singled out as a class by themselves and the absolute benefits determined by the Board of County Commissioners without regard to their proportionate relationship to the benefits conferred upon other property owners. The assessments upon railroad companies are consequently fixed upon the flat benefits received by them without regard to the ratio which they may bear to the benefits received by other classes of property.

III.

THE SOUTH DAKOTA DRAINAGE STATUTE IS UNCONSTITUTIONAL AS RESPECTS RAILROADS FOR THE REASON THAT IT PROVIDES NO NOTICE OF HEARING OR RIGHT OF HEARING EVEN UPON THE QUESTION OF THE APPORTIONMENT OR EQUALIZATION OF BENEFITS.

In this connection we ask the Court to carefully consider and analyze §8463 of the Revised Code of 1919, (Transcript pp. 30-31), hereinbefore quoted. It requires the county commissioners to proceed as follows:

(a) After the establishment of the drainage and fixing of damages, to "fix the proportion of benefits of the proposed drainage *among the lands affected,* and to appoint a time and place for equalizing the same;"

(b) To give notice of such proportion of benefits and equalization of benefits by publication and posting;

(c) To state in the notice the route and width of the drainage, "a description *of each tract of land affected,*" and the names of the owners of the "several tracts of land," and the proportion of benefits "*for each tract of property,*" and to notify "all such owners" to show cause why the proportion of benefits shall not be fixed.

The foregoing is all that this section requires the county commissioners to do with reference to the question of equalization of benefits prior to the hearing, and with reference to notice.

The section then further provides that upon the hearing, without any provision whatever for notice, the benefits (not the proportion of benefit) "which any railroad company may obtain for its property by such construction" and the proportion of benefits which any county, city, town or township may so obtain "shall be fixed and "equalized *together with the proportion of benefits to "tracts of land.*"

It will be observed that notice is required to be given only to the owners of the "several tracts of land." This is so plain as to scarcely admit of argument. That the right of way, embankments, bridges, and other property (not agricultural land) of railroad companies were not deemed to have been included within the term "tract of land" or "tract of property" is clearly evidenced by the fact that the legislature found it necessary to make and made in the latter part of §8463 special provision for ascertaining "the benefits which any railroad company "may obtain for its property by such construction," and for equalizing the same "together with the *proportion of "benefits to tracts of land.*" This provision is entirely superfluous if such property should be held to be included within the meaning of "a tract of land" as such term is used in the preceding portion of the statute pro-

viding for the fixing of proportion of benefits and giving of notice and in fact is inconsistent with such interpretation.

When the South Dakota drainage statute is critically examined, it is evident that it purports to authorize the Board of County Commissioners to determine the benefits to railroads and to assess the same without any notice and without the giving of any opportunity to be heard.

IV

THE STATUTE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THAT IT PROVIDES FOR AND REQUIRES ASSESSMENT FOR THE ENTIRE COST OF DRAINAGE WITHOUT REGARD TO THE RELATION OF BENEFIT TO COST.

The statute does not of itself fix or establish drainage districts or in any manner fix or define the boundaries of any area to be assessed for the cost of a drainage project. It provides no proper method for the organization of a drainage district. It does not provide for any determination that the cost of drainage will not exceed the benefit to be derived. It does not afford property owners the right to be heard, at any time or place, before any tribunal, upon the question as to whether or not such cost will exceed the benefit, nor with reference to the amount and validity of the tax to be assessed against their property.

The statute does not create taxing districts and provide that the property in such districts shall be assessed for the cost of the benefit of drainage projects constructed within their boundaries. If it did, unless it were so arbitrary as to render it vulnerable to attack upon constitutional grounds, we would concede that such legislative determination would be conclusive upon the question of the relation of benefit to cost and that upon such question property owners would have no right to be heard. The rule, however, is different when such determination is delegated by the legislature to a subordinate body. In that event property owners are entitled to notice and hearing upon that question.

Spencer v. Merchant, 125 U. S. 345.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

Road Improvement District No. 2 v. Missouri Pacific Railroad Co., 275 Fed. 600.

It is only when there has been legislative determination as to benefits, in which the determination that the benefits equal or exceed the cost is necessarily involved, that the property owners' right to be heard is limited to the question as to the proportional amount and validity of his tax. In all cases where the authority to determine such questions is delegated by the legislature to another body jurisdiction cannot attach in such subordinate body unless the property owner, by requirement of the delegating statute, is given notice of and an opportunity to be heard upon the question of whether or not his property is or may be benefited by the improvement to an extent equal to or exceeding the cost thereof. A statute without such a provision fails to afford due process of law and is void.

It is apparent that the South Dakota legislature has attempted to vest in the County Commissioners the power to establish and construct a system of drainage without first doing any of the following things: creating and defining the boundaries of a drainage district; determining the approximate probable cost of the work, or determining that the benefit to the property to be included within the district and assessed for the cost of the work, will equal or exceed such cost. The only finding the commissioners are required to make before proceeding with the work is that "the drainage proposed or any variation thereof is "conducive to the public health, convenience "or welfare, or necessary or practicable for draining ag- "ricultural lands." (§8462 R. C. 1919, Transcript pp. 29-30). On such determination alone they are authorized to proceed, without limit as to cost, and fully complete the work, without any notice whatever to property owners or any right given to owners to be heard at any stage of the proceedings thereafter until the hearing provided for by §8463, R. C. 1919 (Transcript pp 30-31), upon the

equalization of benefits. There is no requirement that railway companies be given notice even of this hearing.

At the hearing upon the equalization of benefits, nothing is determined except the proportion that the benefit to each tract of property affected bears to the benefit to the tract selected as a unit. The cost of the work and the amount of the assessment is not and cannot be involved. The cost per unit may be many times the benefit per unit but that is not relevant to any issue determined at the equalization hearing. Upon that question there is no hearing at any stage of the drainage proceedings. After the determination of the proportion of benefits, the assessment of the entire cost is made without notice, without hearing, and in the proportions fixed in the resolution equalizing the benefits.

The statute lacks the fundamental prerequisite necessary to the validity of a special assessment for benefits, to-wit: the determination, or proper provision requiring the determination, that the benefits will equal the cost. *Village of Norwood v. Baker,* 176 U. S. 269.

It has been contended that it was the legislative intent that the commissioners in determining whether or not proposed drainage would be "practicable" should base such determination in part upon the relation of cost to benefit. This is not tenable because §8460 R. C. 1919, authorizes them to act upon a preliminary survey made merely for the purpose of aiding the Board in determining the necessity of the proposed drainage, leaving it discretionary with them as to whether or not "a complete "survey such as will be required for the construction of "the proposed drainage and *assessment of its cost" shall be made.* (Italics are ours).

The particular question under discussion was considered by this Court in *Martin v. District of Columbia,* 205 U. S. 135. The statute under consideration required a jury to apportion the cost of a local improvement "according as "each lot or part of land in such square may be benefited "by the opening, widening, extending, or straightening of "such alley." The Court sustained the constitutionality of the act but sustained it only because it permitted, as stated by the Court, "the interpretation that in any event,

"the apportionment is to be limited to the benefit and if "if is so limited all serious doubt as to the validity of "the statute disappears." The Court further said:

"We think it apparent, as was assumed by the Court "of Appeals, that the jury understood their duty to be "to divide the whole cost among the landowners whether "the benefit was equal to their share of the cost or not. "It must be admitted that the language of the statute "more or less lent itself to that understanding. * * * "For this reason, the assessment must be quashed."

The language of the South Dakota statute is quite different. §8462 R. C. 1919 provides that "after the equal- "ization of the proportion of benefits the board may make "an assessment against each tract or property affected "*in proportion to the benefits as equalized* for the pur- "pose of paying the damages and the cost of establish- "ment."

This language admits of but one interpretation when it is considered in connection with the provisions of Code Section 8463. It clearly requires the County Commissioners to first determine the proportion of actual benefits and then to assess the entire cost in such proportion. The question of whether or not the cost exceeds the benefit is never determined and has no effect whatever upon the assessment under the South Dakota statute.

V.

IN CONCLUSION.

When this litigation was before the Court at the October Term, 1925, in the case of *Risty v. Chicago, Rock Island & Pacific Railway Company* and the five other cases reported in 270 U. S. 378, the constitutional questions involved in the case at bar were also presented to the Court. There were involved in those cases other questions arising under the construction of the various sections of the South Dakota drainage statute, and the Court declined to pass upon the constitutional questions and decided the cases upon the questions of statutory construction. *Risty v. Chicago, Rock Island & Pacific Railway Company,* 270 U. S. 378. Subsequently the Su-

preme Court of South Dakota saw fit to overrule the holdings of this Court as to the effect to be given to the South Dakota statute. *State v. Risty*, 213 N. W. 952. This rendered it necessary that the constitutional questions be again presented for determination by this Court and that has been done in the case at bar. In this case no question of statutory construction is presented and the sole grounds upon which the decision of this Court is sought are those relating to the constitutionality of the South Dakota drainage statute under the provisions of the federal Constitution. Many cases have been presented to the courts involving the validity of statutes relating to drainage and other public improvements, the cost of which is defrayed by special assessments upon the properties benefited, but we venture to say that in no reported case has there been involved the questions now presented in this case upon the South Dakota drainage statute. Even in the light of the forced construction given the statute by the South Dakota Supreme Court, we earnestly contend that the South Dakota statute does not comply with the provisions of the Fourteenth Amendment prohibiting the taking of property without due process of law.

For the foregoing reasons we respectfully submit that the order appealed from should be reversed and this case remanded to the District Court with instructions to issue the interlocutory injunction as prayed in the bill of complaint.

Respectfully Submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 501

H. E. BYRAM, et al., Receivers of C. M. & St. P. Ry. Co.,

Plaintiffs and Appellants,

VS.

A. G. RISTY, et al., as County Commissioners of Minnehaha County, et al.,

Defendants and Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF AND ARGUMENT FOR APPELLEES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 501

H. E. BYRAM, et al., Receivers of
C. M. & St. P. Ry. Co.,
Plaintiffs and Appellants,

vs.

A. G. RISTY, et al., as County Commissioners of Minnehaha County, et al.,
Defendants and Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF AND ARGUMENT FOR APPELLEES

JURISDICTIONAL GROUNDS INVOKED.

Order and judgment herein denying an application by the plaintiffs and appellants for an interlocutory injunction against the defendants and appellees was made by Judges William F. Booth, George C. Scott and James D. Elliott, on July 12, 1927. (R. 132-133).

The plaintiffs and appellants claim that the South Dakota Drainage Law, being Sections 8458-8491 inclusive, Revised Code of South Dakota, 1919, and amendments thereto, is void and in violation of the Fourteenth Amendment to the Federal Constitution for the reasons that said law provides no fixed and determinable method for the apportionment of benefits; furnishes no fixed nor determinable basis for such apportionment of benefits upon the property of railroad companies or other corporations; provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; fails to require a notice to the property owner before a drainage assessment area is established or work constructed; and the claim is made that the tentative apportionment made, shown by Exhibit "C" (R. 46-90), is wholly speculative, arbitrary, unjust, illegal and discriminatory and without any reasonable or rational basis, and that the same is not in proportion to any benefit which the property of appellant has ever received or ever can receive, and that appellants' property has not been and never can be benefited by the work performed to the extent claimed or to any extent whatever, and that the claimed apportionment is out of all proportion to the apportionment sought to be placed upon agricultural lands in the vicinity. (R. 22-23).

The appeal to this Court is taken under the provisions of 36 Stat. 557 and amendments thereto, being Sec. 266 of the Judicial Code.

STATEMENT OF THE CASE.

The territory contained in and affected by these drainage proceedings consists of property within

the city limits of the City of Sioux Falls and a small strip of territory south of said city and adjacent to the Big Sioux River as it flows around said city, also territory west of the city limits of Sioux Falls and a strip of territory, approximately three miles wide extending north of the City of Sioux Falls in the valley of the Big Sioux River and in the vicinity of the river a distance of approximately fifteen miles.

The outlet to these ditches is in the Big Sioux River in the city limits of Sioux Falls, east and just south of the state penitentiary.

About July 1, 1907, a petition was filed with the appellee Board for the construction of a drainage ditch with its initial point about three miles north of Sioux Falls and its terminal point in the Big Sioux River as above indicated. Such proceedings were had upon this petition that there was established a drainage ditch known as "Drainage Ditch No. 1," which was thereafter constructed, completed and paid for by special assessments upon property benefited thereby.

During the construction of this drainage ditch, and in the month of January, 1909, other petitions were filed asking for the enlargement of this ditch project by extending the same several miles north and emptying this enlarged ditch through the terminal point of Drainage Ditch No. 1, which petitions were heard upon notice and the appellee Board determined that said petitions should be granted enlarging said Drainage Ditch, and which enlarged project was designated "Drainage Ditch No. 2," (R. 4, 5, 106, 120, 121), and cost approximately $81,000.00. (R. 126).

In October, 1910, the appellee Board fixed the apportionment of benefits for Drainage Ditch No. 2 (R. 120), and gave notice as required by law of the equalization of the same, which notice named the appellant Railway Company and described the property benefited, and apportioned the number of units as set forth in Paragraph 20 of plaintiff's bill of complaint (R. 16-17); and on November 4, 1910, entered an order equalizing and fixing the proportion of benefits against appellant's said property, from which order said appellant Railway Company appealed to the Circuit Court of Minnehaha County, South Dakota, and thereafter removed said cause to the United States District Court for the District of South Dakota, Southern Division (R. 127, 128), and thereafter the parties hereto, the said appellant Railway Company and the appellees herein, entered into and filed and presented to said United States District Court their signed stipulation (R. 127, 128, 129), wherein they agreed that judgment be entered in said removed cause "fixing the equalized proportion of benefits chargeable to the appellant (Chicago, Milwaukee & St. Paul Railway Company) for benefits to its said right of way in said matter in the number of units that will, when the final assessment is made in said drainage ditch proceedings, produce the sum of $8,500.00, and that the said money assessment so made shall be entered against said Railway Company in the sum of $8,500.00"; and pursuant to said stipulation and on January 15, 1912, a judgment (R. 129-130) was duly and regularly entered in said Court adjudging that the equalized proportion of benefits, made by the appellee Board on November 4, 1910, be and the same was modified by reducing the number of units as-

sessed against the appellant Railway Company from 257 units to the number of units that would, when the final assessment was made in said drainage proceedings, produce the sum of $8,500.00, and thereafter pursuant to said judgment the appellee Board made an assessment against the appellant Railway Company in said sum of $8,500.00 and which sum was on April 8, 1912, paid by the appellant. (R. 131). The property described in the said stipulation, judgment and receipt (R. 127-131) is all described in the new apportionment notice, Exhibit "C". (R. 12, 13, 89).

In the spring of 1916, flood waters washed out the concrete trough built to conduct the ditch waters down the bluff, near the state penitentiary, into the Sioux River below the bluff, and washed out a natural barrier between the river and a short lateral ditch about two miles north of the City of Sioux Falls, permitting the river to flow unobstructedly into this lateral ditch, thence into the lower end of Drainage Ditch No. 2 and down the bluff near the penitentiary, washing the same away. (R. 108).

After the Board had taken steps to dam up the ditch to prevent the water running wild (R. 109), a petition was presented to the Board by proper parties, asking for the establishment of what was known as the Covell Lake cut-off (R. 110), and the abandonment of the old outlet, being about one mile of the lower end of Ditch No. 2, upon which petition, after notice, a hearing was had and the prayer of the petition was granted. (R. 11).

Nothing further was done upon the Covell Lake cut-off and outlet, but about August 3, 1916, a petition was filed with the Board, signed by the City

of Sioux Falls, F. L. Blackman and others, asking for the enlargement of Drainage Ditch No. 1 and Drainage Ditch No. 2. (R. 111). Upon notice given according to law, a hearing was had and, no one objecting, the prayer of the petition allowed (R. 112-113) establishing the enlarged drainage over the exact line and right of way of the old ditches. After hearing upon damages, construction work was started and the old ditch cleaned out, enlarged, diked, river canalized, and other improvements made.

On June 10, 1921, the Board fixed a new tentative apportionment of benefits to the property affected by the enlarged project and fixed August 1, 1921, at the office of the County Auditor as the time and place for hearing upon the equalization of the tentative apportionment of benefits (R. 46-90 inclusive). Appellants failed and refused to appear or file written protests or any protests at the time and place fixed, or at all, against the apportionment made against its properties because of alleged unconstitutionality of the law or for any other reason. (R. 14, 21, 121).

Instead of presenting objections before the Board on August 1, 1921, as required, and about July 25, 1921, and prior to the hearing on said equalization of said apportionment of benefits, appellant Railway Company filed its bill in equity in the United States District Court for the District of South Dakota, asking the same relief, in practically the same language, as is requested in this action (R. 22, 23, 102, 103), viz: a perpetual injunction against the defendants and appellees herein (R. 14) enjoining and restraining them from making any assessment of any kind upon any of the property of said appel-

lant, upon the ground that the drainage law of South Dakota was void and in violation of the Fourteenth Amendment to the Constitution of the United States (R. 102-103), being the same identical grounds as alleged and claimed in the present action. (R. 22-23).

A trial of the issues made in the United States District Court for the District of South Dakota was had, and about March 2, 1922, that Court decided that the drainage law of South Dakota was not in violation of the Federal Constitution, but that the work done constituted merely maintenance and repair of old Drainage Ditch No. 2 and did not constitute the establishment and construction of an enlarged project, and therefore, because the assessment undertaken was not made upon the basis of maintenance and repair work (R. C. Sec. 8470), but upon the theory that said project was an enlarged or new project, the trial court thereupon enjoined the defendants and appellees from making any assessment for benefits to any property of the appellant outside of the original assessment area of Drainage Ditch No. 2 (R. 90-94 inclusive); the court's opinion in this case being reported in 282 Fed. 364.

Thereafter an appeal was taken by the appellee Board to the Circuit Court of Appeals of the United States for the Eighth Circuit by the above named appellees, but appellant Railway Company took no appeal from the decision of the District Court holding the drainage law constitutional; which last named court affirmed the decree of the United States District Court, and the opinion thereof is reported in 297 Fed. 710.

Thereafter an appeal was taken by the appellee Board to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals for the Eighth Circuit, and upon hearing, the Supreme Court, on March 1, 1926, affirmed the decree of the Circuit Court of Appeals, the opinion in which case is reported in 270 U. S. 378.

RESUME.

1. Appellant, under the drainage law, had the right and opportunity, after notice given, to be heard before the Board of County Commissioners, a statutory tribunal, on August 1, 1921, as to the validity of these drainage proceedings, and it failed and refused to appear before the Board and so object to the validity or legality of the proceedings or of the apportionment tentatively made against it.

2. In a trial had in the U. S. District Court for the District of South Dakota in January, 1922, between these same parties upon the same issues as here tendered, the trial court held that the South Dakota drainage law was constitutional, appellant herein obtaining only a part of the relief prayed for, and thereafter appellant took no appeal from said decision; which holding of the trial court was affirmed upon appeal to this Court. (270 U. S. 378).

3. In the case of *Risty vs. C. M. & St. P. Ry. Co.*, 282 Fed. 364, which was finally appealed to this Court and reported in 270 U. S. 378, each of the Federal Courts ruled and decided, as to the appellant herein, that under the South Dakota drainage law the work undertaken in 1916 on the project now in controversy constituted maintenance and repair

work on old Drainage Ditch No. 2, and did not constitute the establishment of a new or enlarged drainage project, and that by reason of said finding and determination the apportionment and prospective assessment was upon an improper basis and could not be sustained because not made as provided by law upon the apportionment previously made for Drainage Ditch No. 2. Upon apportionment being made for Drainage Ditch No. 2, in 1910, notice and hearing was had upon the equalization thereof, and from the order finally equalizing the same the appellant herein perfected an appeal to the state Circuit Court and then removed the cause to the U. S. District Court where, upon stipulation of parties hereto, judgment was entered decreeing that appellant's property was benefited by the construction of said ditch to the extent of $8,500.00 out of a total cost of construction of $81,106.00, or equal to 10.48% of the total cost of the construction of said ditch; and subsequent proceedings were had by the appellee Board correcting its original apportionment and equalization to coincide with the judgment of the U. S. District Court, and thereafter appellants herein paid their proportionate share of said cost in accordance with said judgment, namely, $8,500.00.

The foregoing being the facts in this suit, we submit on behalf of the appellees the following:

BRIEF AND ARGUMENT.

PRELIMINARY QUESTIONS.

Before taking up the question of the constitutionality of the drainage law claimed to be presented to this Court by appellants herein, appellees feel there

are preliminary questions to be determined by the Court which will make it unnecessary to consider the constitutional question. As was said by this Court in the case of *Shepard vs. Barron,* 194 U. S. 553, 565:

> "Before coming to the consideration of the validity of these objections to the statute (constitutional question) the defendant insists that by virtue of the facts already detailed in the foregoing statement, the plaintiffs are not in a position to raise the question."

We have hereinbefore presented the concrete conditions which constitute appellees' objections to the consideration by this court of any constitutional question, and will discuss them in the order above set forth.

I.

APPELLANTS, BY THEIR FAILURE TO PROTEST THE INVALIDITY OF THE DRAINAGE STATUTE OF SOUTH DAKOTA BEFORE THE STATUTORY TRIBUNAL (BOARD OF COUNTY COMMISSIONERS), ARE ESTOPPED AND BARRED FROM NOW URGING THE UNCONSTITUTIONALITY OF THE DRAINAGE LAW.

Appellants, under the drainage law of South Dakota (R. C. 8461, 8463), were given an opportunity, after notice given, to be heard before the Board of County Commissioners, a statutory tribunal empowered to pass upon such matters, as to the validity of the drainage proceedings and the apportionment made against the appellants before the assessment was made or finally became a lien against appellant, and appellant failed to appear before said Board and failed to protest in writing or at all, questioning the validity of the proceedings had or

of the apportionment made or assessment to be made against it, and thereby waived and abandoned such right and cannot now be heard to complain.

Gorham vs. State Tax Comm., 266 U. S. 265.
First Nat. Bank vs. Comm. of Weld Co., 264 U. S. 450.
Milheim vs. Moffit Tunnel, 262 U. S. 710.
McGregor vs. Hogan, 262 U. S. 234.
Farncomb vs. Denver, 252 U. S. 7.
Robt. Noble Estate vs. Boise City, 19 Fed. (2d) 927, 933.
K. C. So. Ry. Co. vs. Levee Dist., (C. C. A. 8th Cir.), 15 Fed. (2d) 637, 641.
Union Pacific Ry. Co. vs. Board of Weld County, 217 Fed. 540.
State vs. Risty, (S. D. 1927), 213 N. W. 952.
Sanborn County vs. Estabrook, 49 S. D. 360.

The record in this cause shows that appellant never appeared before the Board of County Commissioners either in response to the notice to show cause why the drainage should not be established (under R. C. Sec. 8461) or in response to the notice to show cause why the tentative apportionment made should not be fixed as stated, under the proceedings initiated in 1916 (R. C. Sec. 8463) (R. 12, 13, 14, 99, 121), and they failed to urge the invalidity of said drainage law and the constitutional question here presented in the proceedings had on old Drainage Ditch No. 2, as shown by stipulation and judgment of the United States District Court of South Dakota. (R. 127-130).

In the case of *U. P. Ry. Co. vs. Weld County*, 217 Fed. 540, 544, 546, the Circuit Court of Appeals, Eighth Circuit, said:

> "We are not concerned with the cause of the invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause, it can do no more than make the tax invalid, and that alone is not ground for equitable jurisdiction. * * * We decline to express an opinion as to the validity of the tax. *That issue must be determined in an action under the statute.*"

In *Farncomb vs. Denver,* 252 U. S. 7, 12, upon a writ of error, this Court said:

> "As the plaintiff in error had an opportunity to be heard before the Board duly constituted (by § 300), they cannot be heard to complain now."

In *Milheim vs. Moffit Tunnel,* 262 U. S. 710, 723, this Court used the following language:

> "Where a city charter gives property owners an opportunity to be heard before a Board respecting the justice and validity of local assessments for proposed public improvements and empowers the Board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessment as unconstitutional."

In the case of *Gorham Mfg. Co. vs. State Tax Commissioner of N. Y.*, 266 U. S. 265, 269, this Court held:

> "We are of the opinion, however, that, without reference to these constitutional questions, the bill was properly dismissed by the District Court because of the failure of the company to

avail itself of the administrative remedy provided by the statute for the revision and correction of the tax.

"A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax cannot thereafter be heard by a judicial tribunal to assert its invalidity."

In the case of *Bagley Elevator Co. vs. Butler,* 24 S. D. 429, the Supreme Court of South Dakota said:

"Where a party whose property is assessed much higher than that of other taxpayers shall have requested the several Boards to equalize the taxes in the manner fixed by the statutes by raising the amount of all other property to its actual values, and such Boards shall have refused or failed to do their clear duty under the law, then and only then let such party apply to such Courts for relief."

In the case of *Sioux Falls Savings Bank vs. Minnehaha County,* 29 S. D. 146, the Supreme Court of South Dakota, referring to the *Bagley Elevator Co.* case, *supra,* said:

"We laid down a rule as to what was the duty of a party before applying to the courts for relief and held that the plaintiff in that case had not performed such duty. * * * We hold that such relief should only be granted as a last resort and where no better remedy was or had been available."

From the foregoing it is apparent that if the South Dakota drainage law gives property owners an opportunity to be heard before a tribunal or Board authorized to hear such complaints, then such

property owner must first submit his criticism of the law, and test its invalidity or its unconstitutionality or the apportionment made or the basis of such apportionment, to such Board or tribunal before such complaining party may submit such matters, including its unconstitutionality or invalidity, to the courts.

The South Dakota Drainage law providing for notice and hearing before the drainage ditch is established (R. C. Sec. 8461) reads as follows:

> "The Board shall fix the time and place of hearing of the petition and shall give notice thereof * * *. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

The petition filed, the time of hearing fixed, the notice given mentioned above, and the hearing had thereon, gave the Board jurisdiction over the drainage proceedings and the property affected. *Gilseth vs. Risty*, 46 S. D. 374; *in re Turkey Valley Drainage Ditch*, (S. D. 1927), 212 N. W. 48; *Haggart vs. Alton*, 29 S. D. 509.

Section 8462 of said statute further provides:

> "After full hearing the drainage may be established * * *. When the Board * * * shall have fully heard and considered said petition and all matters in opposition thereto, or in support of the same, it shall * * * deny * * * or establish said drainage" (in accordance with its findings).

Thus the law requires the state tribunal to fix a time and place of hearing, give notice to all persons

affected and have a complete hearing of the issues presented, make findings and enter its order thereon either establishing or denying the drainage. The question of the constitutionality of the drainage law or other invalidity of the proceedings may be presented, considered and determined at this first hearing.

The South Dakota drainage law further empowers the Board to fix a tentative apportionment of benefits among the properties affected and provides for notice and hearing on the equalization of such tentative apportionment (R. C. Sec. 8463) as follows:

> "Such notice * * * shall notify all such owners (of property affected) to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the Board of County Commissioners shall finally equalize and fix the same according to the benefits received."

These sections of the statute, as construed by the highest Court of the State, require that the County Commissioners fix a time and place of hearing, and that notice of such hearing be given by publication and posting. Any person affected or interested in the project is given an opportunity to file objections and have a hearing thereon, both before the drainage is established and again before the tentative apportionment becomes permanent, and before an assessment can be made thereon. After such hearing the Board is required to make its findings and determination according to the facts found. If persons are aggrieved, the law permits an appeal to be

taken and a trial had as an original action before the Circuit Court. (R. C. Sec. 8469).

Milne vs. McKinnon, 32 S. D. 627, 632.
State vs. Pound, 34 S. D. 628, 631.
In re Drainage Ditch No. 12, 44 S. D. 161.
State vs. Risty, (S. D. 1927), 213 N. W. 952.

These statutory requirements bring the proceedings had before the Board of County Commissioners under this drainage law into that class of legislation mentioned in *Farncomb vs. Denver*; *Milheim vs. Moffit Tunnel*, and other cases, supra, in that the property owner is given a notice of hearing and opportunity to be heard before the Board as to the validity of the proceedings had, and the justice of the apportionment made against such property owner before any assessment can be made.

Appellees therefore respectfully contend that appellant having failed to question the validity or the constitutionality of the drainage law, or the proceedings had thereunder before the State tribunal provided by statute, the Board of County Commissioners, or made any objection thereto at all at the times and place designated in the notices given by the Board under said law, it is not now in position to complain as to any of such matters, and by reason of its failure to appear and contest such proceedings upon said grounds at the time designated, it is now estopped from questioning the same in this Court.

Appellees' position as above outlined is in accordance with the holding of the Supreme Court of South Dakota. In the case of *Sanborn County vs. Esterbrook*, 49 S. D. 360, upon the presentation of

the constitutional question in answer to a writ of mandamus, the Court at page 362 said:

"Appellants upon the constitutional question say:

> 'Under this statute no inquiry is required at any stage of the proceedings as to whether the benefit to be derived by the property subject to assessment is equal to or greater than the amount of the assessment contemplated.'

"It is therefore urged that the constitutional provisions, both state and federal, are violated which require due process of law and the equal protection of the law. At the time the drainage ditch was established, Chap. 134, Laws 1907, was the law in effect. Sec. 5 of the Act (now R. C. Sec. 8462), provided for a hearing upon notice and said:

> 'When the Board of County Commissioners shall have fully heard and considered said petition and all matters in opposition to or in support of the same, they shall, if they find the proposed drainage not conducive to the public health, convenience or welfare or not needed or practicable for the purpose of draining agricultural lands, deny said petition. * * * If they find the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, they shall establish the drainage.'

"From that determination appeal was provided. It not being shown that the township

> was unjustly dealt with, we will not at this late state in the proceedings determine the abstract question presented. *The township is not in position to raise it.*"

Under the South Dakota law (R. C. Sec. 8463) the township is placed in the same class or category as railway companies. The highest Court of South Dakota has held that unless the constitutional question, if any, is timely presented to the Board by objection made at the hearing given, the protestant is not in a position to thereafter raise such question in the Courts.

Appellants further complain that the law provides no proper method for apportionment of benefits or basis for determination of apportionment of benefits to railroad companies, and claim that the tentative apportionment made is speculative, arbitrary, unjust, illegal, etc., and that the appellants never received any benefit at all. (R. 22). Each and all of these claims could and would at most only affect the validity of the apportionment, and as said by the Court in the Weld County case, 217 Fed. 540, supra, such issues must be determined in an action under the statute.

In the case of *Milne vs. McKinnon*, 32 S. D. 627, 631, 632, that Court said:

> "Whether it did receive any benefit from the drainage system and the extent of such benefits was a matter clearly within the jurisdiction of the board to determine, and its determination thereon, if honestly made, can only be reviewed upon appeal * * *. Any error, if any, in the method of assessment by

> which a wrong result may have been reached would be a matter to be considered by the reviewing court upon an appeal from the determination of the Board."

In the case of *Curtis vs. Pound*, 34 S. D. 628, 632, wherein a Board of County Commissioners constructed a ditch about twice the length of the one petitioned for and used a different size tiling than that ordered, the Court said:

> "If the commissioners exceeded their jurisdiction in the length of the ditch and size of tiling, its only effect, so far as appellants were concerned, was to increase the amount assessed against them above the amount that should have been assessed. This is a matter which should have been settled at the time of the assessment of benefits and expenses of construction, and appellants' remedy for an unjust or unwarranted assessment was through an appeal to the Circuit Court from such assessment."

WAIVER NOT A FEDERAL QUESTION.

This Court has held that a person may, by his acts or omissions, be estopped from asserting a right he once had under the Constitution of the United States, as well as under a statute, and *the question of whether he has or has not lost such right* by his acts or failure to act *is not a federal question.*

Gaar Scott Co. vs. Shannon, 223 U. S. 468, 470; *Hale vs. Lewis*, 181 U. S. 473, 479-80; *Pierce vs. Somerset Ry.*, 171 U. S. 642, 648; *Seneca Nation vs. Christy*, 162 U. S. 283; *Eustis vs. Bowles*, 150 U. S. 361.

Appellant having failed to file its objections as to the validity of the proceedings or of the drainage law at either the hearing on the establishment on October 3, 1916, or the hearing on equalization on August 1, 1921, has waived and lost such right and is now estopped from prosecuting such claims in this Court, as is held by the State Court in interpreting the said drainage statutes of South Dakota.

In the case of *State vs. Risty* (S. D. 1927), 213 N. W. 952, 957-958, wherein it is alleged and admitted, among other things, that the plaintiff therein did not appear and contest the establishment of the ditch or the validity and justice of the tentative apportionment made, at the time fixed therefor by the Board, the Court said:

> "The plaintiff, having neglected to avail itself at the time and place specified in the notice, of its right to file a protest, cannot now be heard to complain. * * * The notice given is sufficient to inform each and every person affected of his rights and of the time and place when and where he may file such objections, and there is no implied authority permitting the board to change the place when and where protests may be filed. The whole statute is explicit, and unless the protestant filed his written objection at the time and place indicated in the notice, he has waived such right. * * * The failure of the plaintiff and others like situated to file its written protest at the time and place appointed: namely, August 1st, 1921, constituted a waiver of its right to object to the tentative apportionments made by the board."

Hence, the validity and constitutionality of the

drainage law must first be submitted to the state tribunal. The appellant herein having failed and refused to submit said matter to the state tribunal, although it was given a notice and an opportunity to do so, and the State Court, in interpreting this drainage law, having already determined that by such failure or neglect to protest, at the times given, a party assessed waives his right and cannot thereafter complain, and is thereafter estopped and barred from asserting such right or claim in court, the appellant has waived its right to protest and cannot now be heard to complain. For these reasons appellees respectfully contend that this Court, in arriving at its determination, should follow the determination of the State Court in the interpretation of this statute and dismiss this appeal.

II.

APPELLANT IN THE TRIAL OF ITS CASE AGAINST THESE SAME APPELLEES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA IN JANUARY, 1922, ALLEGED THAT THE DRAINAGE LAW OF SOUTH DAKOTA WAS UNCONSTITUTIONAL, AND THAT COURT DECIDED AND DETERMINED THAT THE LAW WAS CONSTITUTIONAL, BUT GRANTED APPELLANT PART OF THE RELIEF DEMANDED FOR OTHER REASONS, FROM WHICH DECISION APPELLANT TOOK NO APPEAL, AND THEREFORE THE CONSTITUTIONAL QUESTION IS NOW RES ADJUDICATA AS BETWEEN THESE PARTIES, AND THE APPELLANT IS NOW ESTOPPED FROM RELITIGATING THAT QUESTION.

The record in this case (R. 103-104-105) shows that appellant alleged and litigated before the U. S. District Court for the District of South Dakota, in an action brought by it in July, 1921, and determined by that Court in January, 1922, the question of the unconstitutionality of the South Dakota drainage law. That Court held and decided (282 Fed. 364) against the contention of appellant and held the law constitutional. In that case appellant sought and prayed for a perpetual injunction, against the appellees, from making any apportionment or assessment against any of appellant's property. The United States District Court granted to appellant a part only of the relief prayed for, in that it restrained the appellees from making any apportionment or assessment upon appellant's property lying outside of the original drainage area of drainage district No. 2, upon the ground and for the reason there decided that the project there (and also here),

in litigation, was the maintenance and repair of old Drainage Ditch No. 2, and not an enlarged or new project; and the apportionment having been made upon the theory that the project was a new or enlarged project, was not made in accordance with the statute governing assessments for maintenance and repair (R. C. Sec. 8470), and was therefore illegal.

The decision of the United States District Court in that case (282 Fed. 364) was by these appellees later appealed to the Circuit Court of Appeals of the Eighth Circuit, from which decision an appeal was taken to this Court, and the opinion of this Court appears in 270 U. S. 378-383. In each of the opinions of the Federal Courts, those Courts necessarily passed upon and specifically decided, in arriving at their conclusion, that the drainage project in controversy was in fact and in substance not a new or enlarged project, but maintenance and repair of old Drainage Ditch No. 2, and the Trial Court held that law constitutional, and no appeal was taken from this holding.

COURT'S OPINION, LAW OF CASE.

It is well settled that in determining just what questions were decided by the decree of the Trial Court we may refer to the opinion of the Court in such cases.

In *Corcoran vs. Canal Co.*, 94 U. S. 741, 744, this Court said:

> "The opinion of the court, then, by virtue of that decree, has become, by well settled principles of jurisprudence, the law of the case as to the parties who were bound by that decree."

See also *Oklahoma vs. Texas,* 256 U. S. 70, 88.
Foundry & Pipe Works vs. Oconto Water Co., 183 U. S. 216, 234.
Baker vs. Cummings, 181 U. S. 117, 124-130.
Mining Co. vs. Mining Co., 157 U. S. 683, 690.
D'arcy vs. Hartford Co. (C. C. A.), 161 Fed. 733.
Stearns vs. Lawrence (C. C. A.) 83 Fed. 738.

Having found and determined that the project in controversy was the maintenance and repair of Drainage Ditch No. 2, and the holding on the constitutional question not having been appealed from, those two findings and determinations became the law of the case and are binding upon the parties thereto, and those questions cannot now be re-litigated by the same parties.

United States vs. Moser, 266 U. S. 236, 241.
Mitchell vs. First National Bank, 180 U. S. 481.
So. Pac. R. Co. vs. U. S., 168 U. S. 1, 48.
New Orleans vs. Citizens Bank, 167 U. S. 371, 396.
Russell vs. Places, 94 U. S. 606.
Cromwell vs. Sac County, 94 U. S. 351, 352.
Packet Co. vs. Sickels, 5 Wall 580.
Aspden vs. Nixon, 4 How. 464.
Hickey vs. Johnson, (C. C. A.), 9 Fed. (2d) 498, 502.
Ayres vs. Cone, (C. C. A. 8th Circuit) 138 Fed. 778.

A judgment between the same parties, upon the same cause of action, is an absolute bar to a subsequent action.

In *So. Pac. R. Co. vs. U. S., supra,* this Court said:

"The general principal announced in numer-

ous cases is that a right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once determined must, as between the same parties, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

From the holding and determination of the U. S. District Court granting appellant a part only of the relief prayed for, that is, restraining appellees from assessing appellant's property outside the drainage area of Drainage Ditch No. 2, but holding that appellant's property in the old drainage area was subject to assessment upon the basis of maintenance and repair, and in the same case holding that the drainage law of South Dakota was not in violation of the Fourteenth Amendment, appellant did not appeal; and not having appealed from such decision and determination, such determination and holding of not only the Trial Court but also of this Court upon appeal by the appellees, became the law of the case, and appellant is bound thereby and is now estopped from re-litigating the question of the constitutionality of the drainage law.

In *The Maria Martin,* 12 Wall 31-40, this Court said:

"Both parties to a civil action may sue out a writ of error to a final judgment (or appeal) but where one party exercises the right, the

other cannot assign error in the appellate court. * * * Where each party appeals, each may assign error, but where only one party appeals, the other is bound by the decree of the court below and he cannot assign error in the appellate court nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

In the case of *Cleary vs. Ellis Foundry Co.*, 132 U. S. 612, 614, this Court said:

"For the reasons given in the opinion in *Avery vs. Cleary,* (132 U. S. 605), the peremptory instruction to the jury to find a verdict in favor of the plaintiff for the surrender value of Policy No. 68429 was erroneous, but as the defendant did not perfect a writ of error, the judgment below must be affirmed upon the ground that no error was committed to the prejudice of the plaintiff."

In the case of *Bowles vs. Outing Co.*, 175 U. S. 262, 268, this Court used the following language:

"Two other defenses were interposed which, * * if sustained, would require the judgment of the court below to be reversed and ultimately a verdict for the defendant. First, that the notice of copyright imprinted on the photograph did not fulfil the requirements of the statute; and second, that the copyright claimed by Bowles is not sanctioned by the constitution. *It is sufficient to say of these that the defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in*

the court below. Canter vs. Ins. Co., 3 Pet. 307; *Chittenden vs. Brewster,* 2 Wall. 191; *The Stephen Morgan,* 94 U. S. 599; *Clark vs. Killian,* 103 U. S. 766; *Loudon vs. Taxing District,* 104 U. S. 771; *Cherokee Nation vs. Blackfeather,* 155 U. S. 218."

After citing the above cases and giving some of the above quotations, Circuit Court Judge Sanborn in the case of *Guaranty Co. vs. Phoenix Ins. Co.*, 124 Fed. 170, says:

"No decision in the Federal Courts in which this rule (set forth in above quotations) has been disregarded or doubted have been called to our attention and none have rewarded a diligent search. The rule has been in force so many years that it is not now a matter of reason but a question of practice. It is to be determined not by an independent consideration and decision of what the rule ought to be, but by a view of the precedents in the national courts which disclose the practice which has been and is prevailing in those courts. The decisions and opinions to which reference has been made disclose the fact that this uniform practice has been and is in accordance with the following rules.

"One may not maintain a writ of error or an appeal from a judgment or decree *which is* so *favorable to him that it secures him all the relief he seeks.*"

Thus, if a party does not secure all the relief which he sought, securing a part only of the same, then such party must exercise his right of appeal

or cross appeal in the first instance, because as to such unsecured relief so sought, he alone is prejudiced and he alone can complain and appeal. The opposite party being the beneficiary of such unsecured relief so sought, under the above rule, cannot appeal from that part of the determination in favor of himself. Therefore, if a party secure a part only of the relief sought by him, the holding and determination of the court adversely to him and in favor of the opposite party becomes the law of the case as to him unless he appeals or cross appeals.

The Court further says in the last above opinion:

> "A defendant in error who does not sue out a writ of error or an appellee who does not take an appeal cannot confer jurisdiction upon an appellate court to consider questions suggested by an assignment or argument of cross errors, nor can he be heard upon such questions."

See also, *Peoria etc. R. Co. vs. United States*, 263 U. S. 528, 536.

Swager vs. Smith, (C. C. A. 4th) 194 Fed. 762, 766.

Therefore, appellees respectfully contend that it having been decided by the Federal Courts in a former case, between these same parties, upon issues properly made, concerning this same drainage project, first, that the work done and performed was maintenance and repair of Drainage Ditch No. 2; and, second, that the South Dakota drainage law was not in violation of the Fourteenth Amendment to the Constitution of the United States: those said two matters are now the law of this case

and res adjudicata, where, as in said former action, the appellant, having obtained only a part of the relief sought by it, failed and refused to appeal from such adverse decision; that the part so unfavorable to appellant, namely, the constitutionality of the South Dakota drainage law, became and is now, as to these parties, the law of the case, and appellant is now estopped and barred from re-litigating either of these questions.

III.

APPELLANT HAVING PAID ITS ADMITTED JUST PROPORTION OF THE COSTS OF DRAINAGE DITCH NO. 2 UNDER THE DRAINAGE LAW CONTAINING PROVISIONS FOR REPAIR AND MAINTENANCE OF SAME, AND HAVING RECEIVED BENEFIT THEREUNDER, IS NOW ESTOPPED FROM QUESTIONING THE VALIDITY OF SUCH LAW TO ESCAPE PAYMENT OF ITS JUST PROPORTION OF THE MAINTENANCE AND REPAIR OF THAT DITCH.

Prior to November 4, 1910, there was established, constructed and completed what was designated as "Drainage Ditch No. 2" (R. 4, 10, 106, 127, 128); an apportionment was made, and on November 4, 1910, hearing had thereon and appellee Board entered its order of equalization, from which order appellant company appealed to the State Circuit Court, removed said cause to the United States District Court (R. 128), and on January 3, 1912, stipulated that its just proportion of assessment for the cost thereof resulting from benefit was the sum of $8,500.00 (R. 127-128-129), and on January 15, 1912, an order and judgment in accordance with said stip-

ulation was entered in said Court (R. 120-130) and thereafter and on April 8, 1912, appellant paid said assessment. (R. 131).

In 1916, a petition was presented to appellee Board to reconstruct, enlarge and improve Drainage Ditch No. 2 (R. 10, 111, 114), and thereafter such proceedings were had as required by law, pursuant to notice given, and on October 3, 1916, (no one objecting or protesting), the Board granted the prayer of the petition. (R. 102-103, 112-113).

On June 10, 1921, appellee Board made a new tentative apportionment of benefits on the last above project and gave notice, as required by law, fixing August 1, 1921, as the time for hearing on equalization thereof (R. 12, 46-90, 116), at which time appellant made no remonstrance or objection to the new tentative apportionment made, or the validity of the proceedings or of the drainage law. (R. 21, 121, 122).

Prior to the August 1, 1921, hearing on equalization and about July 25, 1921, appellant instituted an action in the United States District Court against appellees to obtain a perpetual injunction restraining and enjoining appellees from making and collecting any assessment against appellant company or its property for the costs of work done and improvements made on Drainage Ditch No. 2. (R. 14, 117, 102, 103, 104, 105).

Upon the trial of the issues in that case that Court on March 2, 1922, found, decided and held that the work done and performed under the aforesaid proceedings constituted maintenance and repair of old Drainage Ditch No. 2, the case being reported in 282 Fed. 364.

Thereafter appellees herein appealed said cause to the United States Circuit Court of Appeals, Eighth Circuit, (297 Fed. 710), and from that Court to the Supreme Court of the United States, which latter Court on March 1, 1926, affirmed the decree of the Circuit Court of Appeals (270 U. S. 378), and each of said Courts held, found and determined that the work and labor done on said project constituted maintenance and repair of old Drainage Ditch No. 2.

We have hereinbefore presented the authorities giving the well settled rule of law that the opinion rendered by a trial court may be read in conjunction with the decree of that Court, in a given case, to determine just what were the findings of the Court and the basis of the decision (p. 23, supra). It has been settled by the above mentioned decisions in the Federal Courts that as between the parties hereto, the work and labor done and performed upon the present drainage project during and subsequent to the year 1916, in payment for which assessments to be made are here contested, was merely maintenance and repair on the old ditch.

The Federal Courts having decided, in the due exercise of their jurisdiction, the character of the work done as between the parties hereto, viz: maintenance and repair — the matter, whether rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified.

Chi., R. I. & Pac. R. Co. vs. Schendel, 270 U. S. 611, 617.

U. S. vs. Moser, 266 U. S. 236, 241.

Hickey vs. Johnson, 9 Fed. (2d) 498, 502.

After having confessed and paid its just proportion of the costs of the establishment and construction of Drainage Ditch No. 2, or the sum of $8,500.00, and thereby recognizing the validity of said drainage proceedings and the drainage law of South Dakota, appellant now asserts that it should not pay any proportion of the costs of the maintenance and repair thereof, because, as it now alleges, the law is invalid and unconstitutional. These appellees respectfully contend that appellant, having once recognized the validity of that proceeding and the drainage law governing the same and having accepted the benefits derived therefrom, cannot now assert that the proceedings and the drainage law under which the improvements were made are invalid and unconstitutional.

Pierce Oil Corp. vs. Phoenix Refining Co., 259 U. S. 125, 128.
Wall vs. Parrott Silver & Copper Co., 244 U. S. 407, 411.
Pullman Co. vs. Kansas, 216 U. S. 56, 66.
Pierce vs. Somerset Ry., 171 U. S. 642, 648.
Electric Co. vs. Dow, 166 U. S. 489.
Eustis vs. Bowles, 150 U. S. 361.
Great Falls Mfg. Co. vs. Garland, 124 U. S. 581, 597.
Dunn vs. Fort Bend Co., 17 Fed. (2d) 329, 333.
Muscatine Light Co. vs. Muscatine, 256 Fed. 933.

In the case of *Pierce vs. Somerset Ry.*, 171 U. S. 642, 648, this Court said:

> "A person may by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question wheth-

er he has or has not lost such right by his failure to act or his act is not a federal one."

In *Muscatine Light Co. vs. Muscatine,* 256 Fed. 933, the Court said:

> "A person may, by his acts or omission to act, waive a right which he may otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid if the party making the objection had not, by prior acts, precluded himself from being heard in opposition."

In *Eustis vs. Bowles,* 150 U. S. 361, this Court held that Eustis possessed a right which was protected by the Constitution of the United States, but that this right the state court held had been waived by him by his action, and as to whether the State Court was right or not was not in fact a federal question.

In the case of *Pierce Oil Corp. vs. Phoenix Refining Co.,* 259 U. S. 125, 128, this Court used the following language:

> "The contention that this order of a tribunal, to the jurisdiction of which the company had voluntarily submitted itself, made after notice and upon full hearing, deprives it (appellant) of its property without due process of law, must be pronounced futile to the point almost of being frivolous. 'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it (216 U. S. 56, 66). And while enjoying the benefits of that privilege, it will not be heard to complain that an order plainly within the scope of statutes in effect

> when it entered the state is unconstitutional. * * * There is nothing in the nature of such a constitutional right as is here asserted to prevent it being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right."

In the case of *Pullman Co. vs. Kansas*, 216 U. S. 56, 66, concerning the right of a state to regulate or prohibit the business of foreign corporations in a state, this Court said:

> "When, therefore, in a case where the absolute power to exclude obtains, a condition is affixed to the right to come into a state, and a foreign corporation avails of such right, it may not assail the constitutionality of the condition because, *by accepting the privilege, it has voluntarily consented to be bound by the condition.*"

The statute law with reference to the method of payment of the cost of the original construction and also of the maintenance and repair of Drainage Ditches is the same now as it was when Drainage Ditch No. 2 was constructed and paid for. (R. C. Secs. 8464, 8467, 8470). (R. 26-44). The appellant, as a party to said proceeding, was charged with knowledge of this law at the time it admitted that it received benefit, and agreed to pay and paid for its proportion of the cost of said original construction, and further that said ditch would eventually require maintenance and repairs, and that it would have to pay its just proportion of the cost thereof pursuant to the said drainage statute. It

could not be a party to the creation and maintenance of a project which might subsequently become a public nuisance, or a project which might become inherently dangerous to adjacent property without contemplating and providing for the maintenance, repair and control thereof. At the time appellant recognized the validity of the proceedings establishing Drainage Ditch No. 2, and the drainage law and benefits received by it thereunder, and paid its proportion of the costs thereof, it tacitly undertook and agreed that it would, under such drainage law, pay for the maintenance and repair thereof, which would necessarily follow, to prevent the same from damaging or injuring adjacent property and to keep the same functioning.

In the case of *Dunn vs. Fort Bend Co.*, 17 Fed. (2d) 329, 333, tried before a three judge Court, Judge Hutcheson said:

> "The invocation of the Fourteenth Amendment is a privilege; the fact that a statute may be obnoxious to the Fourteenth Amendment as to a particular person does not mean at all that it may be so as to another; and this right to invoke the Fourteenth Amendment, being a personal privilege, may be lost by election, waiver, or estoppel. The facts in this case, in the light of the decisions, leave no doubt that any person who might at any time have questioned the validity of the district has long since lost that right by estoppel, waiver or election; the district having existed as a going district for more than sixteen years."

From the foregoing statements of this and other

Courts, it is apparent, and appellees respectfully contend, that appellant, having consented to and paid its just proportion of the cost of the construction of said original drainage ditch No. 2 in 1912 and received the benefit therefrom, is now estopped and barred from questioning the validity of said proceedings, or the constitutionality of said drainage law, in order to thereby escape the payment of his just proportion of the costs of the maintenance and repair of said original drainage ditch.

CONSTITUTIONAL QUESTION.

In discussing appellant's argument as to whether the drainage law of South Dakota violates the Fourteenth Amendment to the Federal Constitution we will follow, as closely as we can, the order of argument of appellant.

I.

NOTICE AND HEARING BEFORE ORGANIZATION OF DISTRICT NOT CONSTITUTIONALLY REQUIRED, BUT ARE PROVIDED BY SOUTH DAKOTA DRAINAGE STATUTE.

Appellant's first contention is that a property owner must have a hearing on the inclusion of his property in a drainage assessment area before the construction of the drainage ditch in order that the law be constitutional. (Pages 15 to 30 Appellant's Brief).

In this appellees contend that appellant is in error.

The constitutional provision relied on, "nor shall any state deprive any person of (his) property without due process of law", is readily divisible into two requirements: First, there shall be no taking of his property, and second "without due process of law": The thing prohibited is the "taking", but even this is not prohibited if it is done with "due process of law." In tax matters there can be no "taking" of an individual's property until the assessment lien becomes incontestible or irrevocable; such a fixed and permanent charge that the property owner can have no adequate remedy to contest

its validity or fairness. Then and then only is the property taken.

In this case the filing of the petition asking for the drainage project, under R. C. Sec. 8459 (R. 27), does not take property or place any lien thereon. The survey provided by the statute, the inspection by the Board of the proposed route, the making of the survey of the proposed drainage area, the furnishing to the state engineer of a copy of the surveyor's report, maps, plans and profiles, the determining of the exact line and width of the ditch, the adoption of a unit of benefit, the making of a tentative apportionment, neither singly nor collectively, in any manner place a lien or charge upon the individual's land or property and has no more or additional effect than the filing of the original petition. And if these acts place no lien upon the individual's property, then there is no "taking" of his property, and it is only the "taking" that is constitutionally protected.

The phrase "due process of law" as applied to tax proceedings, means simply that such notice, hearing and opportunity to contest the tax and the validity thereof be given before the tax becomes a fixed lien, as is appropriate to the nature of the case and is ordinarily and customarily given in such matters under procedure generally adopted in like or similiar matters in the state.

The constitutional guaranty must at all times be distinguished from notices, hearings and procedure which have been or may be prescribed by the legislature. The legislature of a state may make many things prerequisite in tax proceedings, all of which must be strictly followed to make a tax a

valid tax, while few are constitutionally required. For example, in South Dakota the legislature saw fit to require a notice and hearing upon the petition filed for the establishment of a drainage ditch, at which hearing there may be contested (R. C. Sec. 8462, R. 29) the statements of the petition, namely (R. C. Sec. 8459, R. 27): the petitioners are owners of land likely to be affected by the drainage, the necessity for the drainage, whether the same will be conducive to the public health, convenience or welfare or necessary or practicable for the drainage of agricultural lands, the correctness of the proposed route or of its initial and terminal points, the territory likely to be affected thereby, whether the territory likely to be so affected, either benefically or detrimentally, will in fact be affected, and whether the tracts of land proposed to be taken for right-of-way and spoil banks should in fact be taken. There may also be contested the matters set forth in the surveyor's report and the finding of the Board as to the width and as to the route (R. C. Sec. 4262, R. 29), or a property owner may question the validity of the law or of the proceedings had, or put forward any other objection that can be raised upon the hearing on equalization under Sec. 8463 (R. 30). *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 959. But there is no constitutional requirement that any of these matters shall be first determined upon notice and hearing, except, of course, the eminent domain feature, which is not here involved. None of these things place an incontestable lien or charge upon the individual's property and there is therefore no "taking". All of the foregoing matters are purely political matters. These prescribed acts are acts which finally

result in placing a tax upon lands and property in the drainage assessment area, and are acts which the legislature has required the Board to perform, but there is no constitutional requirement that the owners of land or property which may ultimately be compelled to pay for an improvement shall be given notice and hearing at each stage of the proceedings or at the time the foregoing acts are performed by the Board, — because such acts do not place an incontestable or irrevocable lien upon property and do not constitute "taking" of property.

The rule is practically universal, even where the legislature has delegated the authority to determine the necessity, that, where a taxpayer has been given a notice, hearing and an opportunity to contest the amount and validity of his assessment, benefit or tax, before the same becomes irrevocably fixed, such procedure satisfies the "due process of law" clause of the Constitution.

This Court, in the case of *Soliah vs. Heskin,* 222 U. S. 522, 524, in passing upon the constitutionality of the North Dakota drainage law of 1905, said:

> "Neither does that amendment (the Fourteenth Amendment to the federal constitution) invalidate an act authorizing an appointed Board to determine whether a proposed drain will be of public benefit and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property."

In the case of *Londoner vs. Denver,* 210 U. S. 373, 378, this Court said:

> "The only question for this court is whether the charter provision authorizing such a finding (the necessity for the improvement), without notice to the land owner, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment which might or might not subsequently be made. Clearly all this might validly be done without hearing to the land owner, provided a hearing upon the assessment itself is afforded."

In *Land Co. vs. Kansas City,* 241 U. S. 419, 427, wherein the proceedings had were for raising the amount of money necessary to pay for specific property condemned, this Court said:

> "It is also well settled that an owner of property which may be assessed for benefits in order to pay an award for property condemned is not entitled, by virtue of the 14th Amendment, to insist upon being made a party to the condemnation proceeding, or to be heard with respect to the amount of the award. He may not demand, as a Federal right, that the power of eminent domain shall not be exercised save upon notice to him. (Citing cases). As well might it be argued, as was suggested in *Goodrich vs. Detroit, supra,* that whenever the city contemplated a public improvement of any de-

scription, it would be necessary to give notice to all those who might be taxed to pay for it. The established rule is 'that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have *prior notice*'." (*).

See also *Goodrich vs. Detroit,* 184 U. S. 432.

In *Spencer vs. Merchant,* 125 U. S. 345, 356, this Court said:

"If the legislature provides for notice to and hearing of each proprietor at some stage in the proceedings upon the question of what proportion of the tax shall be assessed upon *his* land, there is no taking of his property without due process of law."

See also *Voight vs. Detroit,* 184 U. S. 115.

In *Roberts vs. Smith,* (Mich., 1897), 72 N. W. 1091-1092, the Court said:

"The principal objection made is that, under the law as it now reads, persons who do not own lands traversed by the drain but who are within the assessment district, have no opportunity to be heard upon the question of the necessity for laying the drain. * * * We are not aware of any cases that hold that all persons subject to assessments for drains must have notice of and a hearing upon the question of public necessity."

In *Ross vs. Board,* (Iowa, 1905), 104 N. W. 506, 510, that Court said:

"It is claimed by counsel that complainant was entitled to notice of the hearing relating

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(*) All italics in quotations herein are ours.

to the establishment of the assessment district and of the amount of the total assessment * * *. In the case before us, there is, under the statute, as amended, ample provision for notice to every land owner and opportunity given for the hearing of all objections he may have to assert against the validity and justice of the proposed charge upon *his* property. This, under the law, is all he can rightfully ask."

In *State vs. Redwood County,* (Minn., 1889), 42 N. W. 473, the Court at page 475 held it to be a false assumption:

"That in proceedings in the exercise of the taxing power the property owner is entitled to notice and to be heard in each preliminary step in the proceedings *pari passu* with their progress. * * * We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property owner has an opportunity to question the validity or amount of the tax, either before that amount is determined or in subsequent proceedings for its enforcement."

In the case of *In re: Bonds of Madeira Irrigation District,* (Cal., 1891), 28 Pac. 273, 278, that Court said:

"The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the or-

> ganization of the district are only for the creation of a public corporation to be invested with certain political duties which it is to exercise on behalf of the state. * * * * It must be observed that such proceeding does not affect the property of anyone within the district and that he is not, by virtue thereof, deprived of any property * * *. His property is not taken from him without due process of law if he is allowed a hearing at any time before the lien of the assessment thereon becomes final."

In *Bemis vs. Guirl,* (Ind., 1914), 105 N. E. 496, 498, the Court said that it was contended concerning the law in controversy "that it makes no provision for notice to appellant or other persons of a hearing on the question of the public utility of the proposed improvement", and at page 500 held:

> "It is not required that the property owner shall be notified of the initial or every intermediate step in the proceeding leading to an assessment against his property. It is sufficient if provision is made for notice and opportunity to be heard before an impartial tribunal before the assessment becomes final and conclusive."

In *Erickson vs. Cass Co.,* (N. D., 1902), 92 N. W. 841, 843, that Court said:

> "It is true several acts are required to be done by the drain commissioners prior to the assessment and hearing. These include an inspection of the route by the drain commissioners, a survey of the same, the making of the specifications, plats and profiles, contracts for

right of way and the order establishing the drain; all of which are done without a hearing. These steps, however, are altogether preliminary and do not in themselves impose any burden upon the land owner."

To the same effect are the following cases:

Paulsen vs. Portland, 149 U. S. 30, 41.
Davidson vs. New Orleans, 96 U. S. 97, 105.
Wurtz vs. Hoagland, 114 U. S. 606, 615.
State vs. Burns, (Minn., 1914), 145 N. W. 377-378.
Johnson vs. Lewis, (Ind., 1888), 18 N. E. 7, 8.
In Re: McRae, (Minn., 1904), 100 N. W. 384, 385.
Brumfield vs. State, (Miss.) 59 So. 921.
Corliss vs. Richford, (Vt., 1911), 81 A. 234.
Haggert vs. Alton, 29 S. D. 509, 529.

Most of these cases here quoted and cited are those in which the improvement district was not created by the legislature of the state, but by a board acting under the authority conferred by statute. These holdings are in direct contradiction of the contention urged by appellant on pages 21 to 26 of its brief and for which it cites no authority at all.

Appellees respectfully contend that the protection afforded the property owner by the Fourteenth Amendment goes only to the "taking" of his property, and that all steps leading up to the final step which does in fact take his property, or in other words, places an irrevocable lien upon the same from which the law gives him no escape, are mere preliminary steps and are purely political matters

concerning which this constitutional provision affords him no protection; that the rule has been long and well established that if the property owner be given a notice, hearing and an opportunity to contest the validity of the proceeding and the amount of his benefit, assessment or tax prior to the same becoming a fixed and irrevocable lien against his property, as is given by R. C. Section 8463 (R. 30), the constitutional provision for his protection has been satisfied, and there is no taking without due process of law.

STATUTE DOES PROVIDE FOR NOTICE AND HEARING BEFORE FORMATION OF DISTRICT.

Although appellant is not constitutionally entitled to a notice of the formation of the district, the confines thereof, or a hearing upon the same, the drainage statute of South Dakota does in fact require the giving to appellant and to all other persons affected, whether their properties are traversed by the proposed ditch or not, a preliminary notice, after the filing of the petition and before the hearing is had for the establishment or non-establishment of the drainage district or assessment area.

R. C. 1919, Sec. 8459, (R. 27), provides that a petition to establish a drainage shall contain (1) a statement of the necessity of the drainage (2) a description of the proposed route; and (3) a *statement of the territory likely to be affected thereby.*

Sec. 8461 (R. 28), provides that a notice of hearing shall be given and that such notice shall set forth (1) the route of the proposed drainage; (2) *the tract of country likely to be affected thereby in*

general terms; (3) the separate tracts of land through which the drainage will pass; and (4) refer to the files for further particulars.

Sec. 8462 (R. 29), provides that upon the hearing, pursuant to the foregoing notice, upon the petition filed, that *any person interested may appear and contest* (1) *the statements* of the petition, which include *the statement of the territory likely to be affected;* (2) the matters set forth in the surveyor's report, and (3) the finding of the Board as to the width and route of the drainage ditch. The petitioners may likewise be heard in support of the petition. We have hereinbefore attempted to set forth some of the issues and some of the grounds of protest that may be raised and presented at this hearing. (Page 39, supra). (*In re Drainage Ditch No.* 12, 44 S. D. 158, 161; *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 959.

The notice given under Sec. 8461 (R. 28), for hearing the petition fixes the tentative confines or boundary of the drainage district and describes the lands and properties that, in the judgment of the Board and surveyor, are likely to be affected by such drainage ditch. They may not be all affected benefically, and some, in fact, may be affected detrimentally, or some may not be affected at all; but it gives to all such owners of property described an opportunity to appear and to there present to the Board the facts concerning their said property. At such hearing their land may be entirely excluded from the assessment area, or it may be determined that it is damaged by flooding and claims presented for such damages, or other issues may be tendered as hereinbefore set forth. (Page 39, supra). The

notice given describing the tract of country likely to be affected describes the property by definitely specifying each section, township, range and city subdivision, claimed to be affected by the drainage project, and notifies the owners of such property of said hearing and summons them to contest the inclusion of their land in such drainage district. The second part of the notice runs to the owners of land whose property will be taken for the right of way, spoil banks, or for ponding back purposes of the drainage project, and applies alone to the eminent domain feature of the law, which is not here in controversy.

Sec. 8462 (R. 29), also provides that if the Board at the hearing extend or vary the proposed ditch to fully accomplish the drainage, then it shall adjourn the hearing and give a new notice "to all parties newly affected as in the case of the original hearing". This requirement conclusively shows the intent of the legislature that all persons whose land or property will be *affected* must have a notice and opportunity to appear and contest the inclusion of their property within the district.

Therefore, if these statements in the petition and notice and the matters that may be contested, as to the *tract of country likely to be affected* by such drainage project do not evidence an intention of the legislature to require the Board to determine, at this hearing, the general boundaries of the drainage district that will be affected and included in such project, then appellees can see no purpose for that part of the *petition,* and *notice* describing the "tract of country likely to be affected by such improvement", nor can there be any reason or pur-

pose in the law allowing at the hearing contest of the statements of the petition, which contains a "general statement of the territory likely to be affected," or any purpose in the new notice and hearing "to all parties newly affected" required by R. C. Sec. 8462 (R. 29), when the route of the ditch is so changed by the Board at its first hearing as to affect new territory. Obviously these provisions of the law extend to and require a hearing upon the facts required to be stated in the petition and notice, namely, as to what property is likely to be affected. Whether or not certain property will or will not be affected is a fact question, and this notice and hearing gives such property owners the right to be heard upon that question. Surely the law would not require or contemplate an idle act. A notice, hearing and determination, and the right to contest the "tract of country likely to be affected" is expressly given by Sec. 8462. (R. 29). If a hearing and determination upon "the tract of country likely to be affected" is not to be had, then there is no purpose in the requirement of the law of such description being put in the petition and notice, or the opportunity given to contest that question. All that need be required would be a notice to the land owners through whose lands the ditch would pass, in order that they might appear and present their claims for damgaes, if any, under the eminent domain feature of the law, and we have shown that there is no constitutional requirement of a prior notice as to other parties who may simply be compelled to pay their just proportion of the costs of the project. (Pages 37-46, supra).

See also *Fallbrook vs. Bradley*, 164 U. S. 113, 174.
Paulsen vs. Portland, 149 U. S. 30, 41.

Appellees therefore respectfully contend that under the law of South Dakota, the tentative confines of the drainage district are established by the Board at the first hearing upon the petition presented, and unless there is a special exclusion order made, the district or assessment area thus established must be deemed to include all the lands or properties described in said petition and notice as likely to be affected and that can if benefited be assessed for costs of the project. No other reasonable construction of the statute can be given. If the property owner does not make this showing or secure the exclusion of his property from the confines of this drainage district at this hearing, the land or property is within the assessment drainage area or district, and the question remaining for determination at the second hearing is the amount of benefit, if any, which said property receives from the drainage project.

The District Court of the United States for the district of South Dakota has twice sustained the constitutionality of the South Dakota drainage statute, here involved, prior to its determination in this case, viz, in *Chicago, R. I. & P. Ry. Co. v. Risty,* 282 Fed. 362, 365-371, and *Johnson v. Peterson,* which latter case was affirmed upon appeal by the Circuit Court of Appeals, 8th Circuit, reported in 288 Fed. 735, 738, where the Court found there was ample notice before any final determinations were made. The Supreme Court of South Dakota found the law provided sufficient notice and opportunity to be heard in the case of *State v. Risty,* (S. D., 1927), 213 N. W. 952, 959).

CRITICISM OF STATUTE PRESENTS NO CONSTITUTIONAL QUESTION.

Appellant on page 17 of its brief finds fault with the requirement of the statute for the contents of the first notice, in that it is addressed to all persons interested and describes the property likely to be affected without naming the owner of the property described.

In taxation matters the method to be pursued, the kind of notice to be given, the manner of collecting the tax, etc., are all matters within the exclusive power of the Legislature of the State, and if the notice directed by the statute to be given, and in fact given, is such as will, in all reasonable probability give notice to the parties interested, the constitutional requirement as to notice is fully satisfied. Where the notice to the person or the proceeding in regard to the property is appropriate to the nature of the case the proceedings cannot be said to deprive the owner of his property without due process of law.

Davidson vs. New Orleans, 96 U. S. 97, 105.
Paulsen vs. Portland, 149 U. S. 30, 40.
Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112, 157-8, 174.
Bauman vs. Ross, 167 U. S. 548, 590.
Wright vs. Davidson, 181 U. S. 371, 382.

Notices describing the land without naming the owner thereof have been held sufficient in the following cases:

State vs. Risty, (S. D., 1927), 213 N. W. 952, 959.

Everington vs. Board, (Minn., 1912), 138 N. W. 426, 428.

In re: McRae, (Minn., 1904), 100 N. W. 384, 386.

Hennessy vs. Douglas Co., (Wis., 1898), 74 N. W. 983, 989.

People vs. Brooklyn, 4 N. Y. 419.

Lamb vs. Connelly, (N. Y., 1880), 25 N. E. 1042, 1043.

Kansas City vs. Duncan, (Mo.), 37 S. W. 513.

Lent vs. Tillson, 72 Cal. 404.

Appellees respectfully contend that the notice required by the drainage law of South Dakota, and the hearing given are such notice as is appropriate to the nature of the case, and will in all reasonable probability give notice to the parties interested, and that it therefore is sufficient to answer the requirements of the due process of law clause of the Federal Constitution.

THE STATUTE PERMITS ALL NECESSARY ADJUSTMENTS.

This brings us to the second notice and hearing, given under R. C. 1919, Sec. 8463 (R. 30), and appellant finds no particular fault with this notice and hearing except that he says, "he is like a rat in a trap." (Appellant's Brief, page 19). But is he like a rat in a trap if it can actually escape the payment of any invalid or unjust assessment even upon this hearing? Appellees respectfully submit that if it receives no benefit from the drainage project, it can escape payment of any assessment at this hearing by making its showing.

The statute requires that the notice given of this hearing for equalization of the apportionment of benefits shall be published and posted in exactly the same way as the notice given for the establishment of the ditch under Sec. 8461. (R. 28). A tentative apportionment is made by the Board, taking some tract as a unit and determining its value before and after the drainage project has been constructed and completed; the difference between such values being the value of actual benefit to the unit. In the case of *Milne vs. McKinnon,* 32 S. D. 627, 632, the Supreme Court of South Dakota, in interpreting this provision, said:

> "The drainage act provides that in apportioning the benefits among the several tracts benefited by the drainage system, the Board shall select one tract, *the benefit received by which,* shall be taken as a unit from which to measure the benefits received by all other tracts."

It will thus be seen that the yardstick of measurement used is a definite amount in dollars and cents. In like manner the apportionment is made to all other tacts or property of every class in the drainage assessment area, and the difference in values thus secured, as to each tract or property, is divided in each instance by the unit amount of actual benefit, secured as aforesaid, to determine the number of units of actual benefit to be fixed to each tract or property, whether such tract be agricultural land, railroad properties, municipal properties, roads or other classes, as the method indicated is equally applicable to any of these classes of property, because the common denominator used in each and

every instance, is a definite amount in dollars and cents.

In the case of *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 957, that Court said, as to the issues that may be presented and decided at this second hearing:

> "The matters to be considered before the Board upon this hearing and by the Circuit Court upon appeal are one and the same * * *, namely: Is the tract taken as a unit benefited at all, and if so, how much? Is the protestant's tract benefited, and if so, is its benefit equal to — or more or less than — the benefit to the unit? Therefore, whether the land and property of plaintiff received any benefits, and the extent of the same, is clearly one of the issues to be heard and determined by the Board. The benefit to the unit, if any, is another issue, and the relative benefit of the protestant's property to the unit is another issue. Whether the method pursued is wrong, or one by which a wrong result might be reached, is also an issue. *Milne vs. McKinnon,* 32 S. D. 627. If acts were taken by the Board subsequent to the establishment of the ditch by which the assessment would be increased or would result in an unjust or unwarranted assessment, this, too, is a proper issue for trial before the Board. *Curtis vs. Pound,* 32 S. D. 492. * * * (at p. 959). At the hearing held pursuant to this notice, an interested party may appear and show any reason why his property should not be assessed that he could have shown at the hearing for determining whether the drainage should be estab-

lished. If his property will not be benefited by the establishment of the drainage, this may be shown at either hearing, and if shown at either hearing, his property will not be assessed."

We have now shown that under this statute, as interpreted by the Supreme Court of South Dakota, appellant, after the notice and at the hearing given under Sec. 8463, can have determined the justice and validity of the assessment and the amount of benefit received by it, if any. If its land or property is not benefited, it will be excluded and no assessment made against it. Appellees respectfully submit that this notice and hearing provided for by statute answers all the requirements of the "due process of law" clause of the federal constitution, and that the unit of benefit provided is altogether proper and generally applicable.

APPELLANT'S CASES DISTINGUISHED.

A casual analysis of the Fallbrook and Embree cases, as well as others cited by appellant, will disclose that they do not support the proposition contended for by appellant, namely, that it is necessary that a notice and hearing be given at the time of the establishment of the drainage ditch and before any construction work is done thereon, to make such law constitutional. In each of those cases the court held that it was essential to due process of law that the land owners be accorded an opportunity to be heard upon the question of whether their lands would be benefited, and it so happened that this hearing was given under the law before the works

were constructed, but that is far from holding that it is constitutionally necessary to have such hearing, to determine whether the properties are benefited, before the works were constructed.

Appellant also cites, on page 25 of its brief, the case of *Soliah vs. Heskin,* 222 U. S. 522, in which this Court passed upon the North Dakota drainage law of 1905, but counsel have misconstrued this case. It is true the opinion recites that a certain first notice is given and then at page 523 says:

> "Their assessment of benefit is subject to review, but when confirmed is final, and is then extended on the tax list and collected as other taxes."

And in regard to this latter statement, further at page 524, says:

> "Neither does that amendment (14th Amendment) invalidate an act authorizing an appointed Board to determine whether the proposed drainage will be of public benefit and to create a drainage district consisting of land which it decides will be benefited by such drain and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property."

It is quite apparent from a reading of the quotation that it does not refer to the first notice mentioned in the opinion, but does refer to the matter of assessment of benefits. This case was originally decided by the Supreme Court of North Dakota in 1908, and is reported in 117 N. W. 125. In its opin-

ion the North Dakota Supreme Court at page 128 said:

> "'In *Erickson vs. Cass County,* the drainage age was construed and its constitutionality upheld, as against the contention that it authorized the taking of property without due process of law. It was competent for the legislature to invest the drainage board with power, in good faith and after notice and an opportunity to be heard, to finally determine the benefits accruing to each tract of land in the drainage district * * *.' We see no reason to depart from a rule thus so well established in this state."

The Soliah case originated in North Dakota about 1906. It quotes with approval the case of *Erickson vs. Cass County,* which was decided in 1902, reported in 92 N. W. 841, and it was claimed in the Erickson case, as well as the Soliah case, in State Court, that the law was unconstitutional because it did not accord the property owner a sufficient hearing. Under the law then existing, Sections 1818 to 1850, inclusive, Revised Code 1905, North Dakota, no preliminary notice and hearing upon the formation of the district was required or was given. The surveyor prepared profiles, plans and specifications and an estimate of the costs, maps and plans, and then filed the same with the County Auditor, and the same were subject to inspection, but no published or posted notice was given. Sec. 1821 R. C. N. D. 1905, provided:

> "All persons whose lands may be affected by any drainage may appear before the Board of Drain Commissioners and fully express their opinion upon the matters pertaining thereto."

But there was no notice required or given, and no hearing given upon said matter. The only notice and hearing required and given under the then North Dakota law was provided under Sec. 1825 and 1828, Code 1905, which in substance provided that the assessment should be subject to review after ten days' notice of the time and place when and where such assessments would be reviewed; such notice to be published and copies thereof, not less than five in all, and at least three in each township or municipality interested, should be posted. Here was the only notice and opportunity to be heard upon the question of benefits, and yet the North Dakota Supreme Court in the Erickson case held the law to be constitutional, and further said that all acts leading up to the actual making of the assessment were altogether preliminary and did not in themselves impose any burden upon the land owner, and for that reason one notice and hearing upon the question of the benefits satisfied the due process of law clause. This is the same law under which the Soliah case was instituted. After the Soliah case was decided in state court in 1908 and before it reached a decision in this Court on January 9, 1912, the legislature of North Dakota, at its 1911 session, amended Sec. 1821 of the Code of 1905 and included therein the necessity of issuing a preliminary notice, as is mentioned by this Court in its opinion. It will thus be seen that the Soliah case specifically decides that if *a notice and hearing is* given to the property owner at any time prior to the tax becoming a lien upon his property, at which hearing he has the right to contest the validity of the law or proceedings and the amount of benefit to his property, the constitutional requirement is

fully satisfied, and, therefore, that case fully substantiates appellees' contentions here.

What appellant, on page 30 of its brief, says regarding the statements in the opinions by Judge Kenyon in the Circuit Court of Appeals and by Mr. Justice Stone in this Court upon the appeal of the former case between these same parties, is true, but appellant apparently fails to properly construe such statements. After the decision of that case in the United States District Court for South Dakota, which Court held that the drainage law of South Dakota did not violate the Fourteenth Amendment, appellees herein appealed such case, first to the Circuit Court of Appeals and then to this court, but in neither of said appeals did appellees assign or specify as error the ruling of the trial court upon the constitutionality of the drainage law; and appellant herein, (appellee in said former suit), did not cross appeal, although said holding and determination was against appellant's contention, and it received only part of the relief demanded in said former case. The ruling of the Trial Court upon said constitutional question not having been assigned or specified as error, such matter was not before either of the appellate courts for determination as a question in said case, but was of course, before each of said Courts and was a substantial question in sustaining the jurisdiction of said Courts, but for that purpose only.

Appellees therefore, respectfully contend that there is no merit in appellant's contention that a

notice and hearing must be given before the establishment and physical construction of the drainage ditch in order that said law shall not be in violation of the Fourteenth Amendment to the Constitution.

II & III.

DRAINAGE LAW PROVIDES FOR PROPER NOTICE AND HEARING TO RAILROAD COMPANIES, AND PROVIDES FOR PROPORTIONATE ASSESSMENT AGAINST RAILROAD COMPANIES.

Appellant, in the second and third points, urged, (pages 30 to 36 of its brief), claims that the drainage law is in violation of the Fourteenth Amendment for the reasons: (1). That even though a proper notice of hearing is given as to ordinary land owners, there is no statutory provision for giving notice to railway companies; and (2) that the law is defective, in that while it provides for the Board to determine the "proportionate benefits" to land owners, the Board is required to ascertain "the benefits" which a railway company may obtain.

An analysis of the drainage statute and provisions of law applicable to this contention will disclose the fallacy of appellant's contention.

Sec. 8464, R. C. 1919 (R. 32-33), provides:

> "Whenever an assessment for drainage * * * has been made against any county, city, town or township, as provided in this chapter, the officers of such county, city, town or township whose duty it is, under the law, to make the levy of taxes, shall, at the time of the next annual tax levy after the making of such assess-

ment, make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment * * * and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes."

Renville State Bank vs. Kingsburg, 40 S. D. 191, 197; *Wood Bros. vs. Yankton Co.,* 21 Fed. (2d) 267 (C. C. A. 8th Cir.).

This section also provides (R. 32):

"From the time of filing such certified copy of assessment in the treasurer's office, the same shall be due and payable and shall be valid and *perpetual liens* upon the respective tracts so assessed."

Thus it is apparent that so far as the nature of the tax and the method of collection, there is a clear distinction between the tax against a tract of land, which becomes a lien, and the tax against a county, city, town or township, and that as to the latter, the tax is a mere personal tax and never becomes a lien against any of the municipal property.

Sec. 8464 further provides (R. 31), as to the notice which shall be given by the Board after the assessment is made:

"Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment, and the amount of each assessment, (all this as to tracts of land) *together with* the amount assessed against the county or any city, town, township or railroad company."

Here we observe two propositions: (1). That the county, city, town or township and the railroad companies are placed in one class, as they are connected by the alternative word "or"; (2) we also observe that the owners of tracts of land are in one category and the provision for them is connected with the provision for county, city, town, township or railroads with the words "together with", thus clearly indicating two different taxable ententies or classes of property, and we have already shown (61, Supra) that as to the county, city, town or township, the assessment or tax is a mere personal tax and not a lien upon any of its property.

A railroad cannot be regarded as mere land to be taxed like farm land or building lots. Its value depends upon the whole line as a unit to be used as a thoroughfare and means of transportation. One mile or two of its length is almost valueless of itself (*U. P. Ry. Co. vs. Ryan,* 113 U. S. 516, 522). In the case of *Keokuk vs. Salm,* 258 U. S. 122, it is said:

> "Payment of taxes as finally assessed and extended against real estate is enforced, (as against railroads) in the first instance, not by distraint or levy, but by legal proceedings. * * An application is made by the collector to the county court for judgment against the property."

Sec. 6606, R. C. 1919, (*) provides that all laws relating to enforcement of payment of delinquent

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(*) See Appendix B, pages i to v, infra).

taxes shall be applicable to all taxes levied under the provisions of that article (Railroad Companies) and that whenever such taxes are delinquent, the county treasurer having control of such delinquent taxes may proceed to collect the same in the same manner and with the same rights and powers as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or rolling stock for the collection of such taxes.

By Sec. 6664, R. C. 1919, (*) it is provided that the provisions of the Code relating to general taxes shall apply to the enforcement and collection of delinquent special assessments against a railroad company so far as the provisions are applicable, and that whenever references are made to general taxes, the same shall be contrued to include special assessments as well as taxes for general purposes.

Sec. 6662, R. C. 1919, (*) provides in substance that if a railroad company refuse or neglect for a period of thirty days after a tax becomes delinquent to pay such tax, the county treasurer, in addition to other remedies provided by law for the collection of personal property taxes, may maintain an action in court in his name against such railroad company and if it is found the company is indebted for such taxes, judgment shall be entered accordingly; and the defendant may set up by way of answer any defense which it may have to the collection of such taxes, including the defense that the assessment and proceedings therefor are voidable or even void.

Sec. 6663, R. C. 1919, (*) provides that where a

(*) See Appendix B, pages i to v, infra).

railroad company shall neglect or refuse to pay any special assessment, the officers charged with the collection of the same, when it shall become delinquent (after the judgment is obtained) "shall collect the same by seizure of engines, cars, rolling stock and any personal property of such company in an amount sufficient to pay the special assessment, accrued interest, penalty and costs, advertise the same for sale at least ten days, and if the amount thereof is not paid before the day of sale, the treasurer shall sell the same at public auction."

The procedure, therefore, for the collection of the special drainage assessment against a railroad is approximately as follows: Thirty days after the assessment is made, the Board gives a notice of two weeks' publication of the time when a certified copy of the assessment will be filed with the county treasurer, and shall set forth therein the date when the assessment will become delinquent. Upon that date the certified copy of the assessment is filed in the treasurer's office and from the time of filing of the same, it becomes due, payable and delinquent. (See Sec. 8464, R. C. 1919, R. 31).

In case the railroad companys fails or neglects to pay the same for a period of thirty days after it becomes thus delinquent, the county treasurer institutes an action in Circuit Court in his name as treasurer against the company, and the court determines and fixes the amount due or orders it reassessed, and utimately renders judgment for the just amount of taxes due from the railroad company upon such special assessment (Sec. 6662). (*).

(*) See Appendix B, pages i to v, infra).

If the railroad company shall then neglect or refuse to pay the special assessment thus levied and determined, the county treasurer shall, under the judgment so obtained, and without process but with the same right and power as a sheriff under execution (Sec. 6606) (*), seize engines, cars, rolling stock and any personal property of the railroad company in his county, sufficient in amount to pay such special assessment, penalty, interest and costs, and shall immediately advertise for a period of ten days such sale, stating the time and place when such property will be sold; and if the special assessment, penalty and costs are not paid before the day appointed for such sale, the treasurer proceeds to sell the same at public auction (Sec. 6663). (*).

Under the foregoing provisions it is self-apparent that a special assessment against a railroad company under South Dakota law which, as we have hereinbefore shown, is placed by Sec. 8464 R. C. (R. 31) in the same category or class as counties, cities, town or townships, is a mere personal tax which is to be enforced by the sale of personal property by the statutory tax collector, the county treasurer, and that no other procedure for its collection could be followed under the foregoing statute. The county treasurer, as such tax collector in drainage proceedings, could not seize a few miles of railroad, which few miles would constitute a part of a large interstate carrier system, and sell those few miles under this law, under the general proposition that such assessment is a lien upon such property. Beyond doubt, if such action were taken, it could and

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(*) See Appendix B, pages i to v, infra).

would be restrained as an interference with the carrying on of interstate commence. Thus the railroads, so far as their special assessment is concerned in drainage matters, are clearly and plainly placed by this statute in the same category as counties, cities, towns and townships, and are classified and named in the drainage statutes as "persons" and not "tracts so assessed" by Sec. 8464. (R. 31). Thus it becomes apparent that the legislature clearly intended a distinction by the use of the words in the drainage law of "tract" and "property" and the words "persons" and "tracts so assessed." With the foregoing distinctions in mind and the proposition that so far as assessments are concerned and the method of collection of the same, there are two distinct classes or entities, namely, one where the assessment is on real estate and becomes a lien thereon and the other where the tax is a mere personal tax and never becomes a lien on real estate, but is collected in an entirely different statutory manner, let us again examine Sec. 8464, R. C. 1919, covering assessments.

Sec 8464, R. C. 1919 (R. 31), provides:

> "After the equalization of the *proportion* of benefits, the Board may make an assessment against each *tract and property* affected in *proportion* to the benefits as equalized."

A copy of the certified assessment is filed with the county auditor:

> "but before the same is filed, a notice shall be given * * *. Such notice shall contain a description of the property assessed, the name

> of the owner * * and the amount of *each* assessment, *together with* the *amount* assessed *against* the county, city, town, township or railroad company. * * * From the time of filing such certified copy of assessment * * * the same shall be due and payable and shall be valid and perpetual liens upon the respective *tracts so assessed,* and against *all persons* or governments except the state and the United States."

It will be observed from the foregoing quotation that the assessments to be made are against each "tract *and* property affected" and that from the time of filing the certified copy of assessment, the same "shall be valid and perpetual liens upon the tracts so assessed" and shall be due and payable from "all persons or governments except the state and the United States," from which it appears that the assessment is not only made against two separate taxable classes, but also that these assessments become liens against tracts of land at certain times as to one class, and become due and payable at a certain time from the other class, namely, "all persons or governments." Not only does this section fix the fact that these taxes become liens against certain real estate at certain times, but the statute also fixes a due date, from and after which the personal taxes therein referred to become delinquent, but which are not liens of any kind.

We have hereinbefore called attention (61-62, supra) to the provisions in the notice given under this section, showing the distinction between "amount of each assessment" against the tracts of land and the "amount assessed against the county, etc., or railroad company". Here, again, the distinction is ap-

parent between the assessments against tracts of land and assessments against a railroad company. In the former, a description of the tract is required and the amount of "each" assessment against these tracts must be given, while as to a railroad company the law requires that the "amount assessed against the railroad company" need be given only in such notice, again exemplifying the distinction that appears throughout this law that some of the assessments are made against tracts of real estate which become valid and perpetual liens, and that other assessments are made against "all persons" and are not liens against such persons' real estate but are a personal tax and collected by a statutory method.

It will further be seen that the assessments against these two different classes are made at the same time. These two assesable classes are by the statute joined together and connected by the words "together with". This connecting clause means "along with", "conjointly", "in company with", "at the same moment of time", etc., (8 Words and Phrases 6992), thus showing that the assessment against each of these two classes is made at the same time and in the same manner.

Now with this analysis in mind, showing the two separate taxable classes which are assessed, let us examine Sec. 8463, R. C. 1919, (R. 30), to determine the steps directed to be taken which lead up to such assessment.

It is alleged in the bill (R. 3-4), and it is true, that the drainage statutes of Souht Dakota are

found as Chap. 98, Laws 1905; Chap. 134, Laws 1907, and amendments, which were finally codified in 1919 as Section 8458-8491 inclusive, of the 1919 Code of South Dakota.

Sec. 6463, R. C. 1919, was formerly Sec. 6, Chap. 134, Laws 1907. Sec. 8464, R. C. 1919, was formerly Sec. 7, Chap. 134, Laws 1907.

Sec. 6, Chap. 134, 1907, in providing for the notice of equalization of benefits, says that such notice shall, among other things, state the "proportion of benefits fixed for each tract *or* property, taking any particular tract as a unit." This Sec. 6 was amended by Sec. 4, Chap. 102, Laws 1909, and therein it again appears that the notice should contain the proportion of benefits fixed for each "tract *or* property." No further amendments or changes were made, and this section, as said above, became Sec. 8463, R. C. 1919. (R. 30).

Sec. 7, Chap. 134, Laws 1907, provided in regard to the assessment that the ,'Board make an assessment against each tract *and* property affected in proportion to the benefits as equalized." Sec. 7 was amended by Chap. 102, Laws 1909, which again provided that the assessment was to be made against each "tract *and* property." Sec. 7, Chap. 134, Laws 1907, as amended by Chap. 102, Laws 1909, was again amended by Chap. 130, Laws 1911, and there again it is provided that the Board may make an assessment against each "tract *and* property." This section in 1919 became Sec. 8464, R. C. 1919, where it again appears and is still the law and reads "tract *and* property." (R. 31).

But when Sec. 6 of Chap. 134, Laws 1907, as

amended by Chap. 102, Laws 1909 — both of which read "tract *or* property" — was transferred or copied into the Revised Code, and a typographical error was apparently made and the word "or" was erroneously changed to the word "of", so that Sec. 8463, R. C. reads "tract of property." (R. 30).

Reading Sec. 6 and Sec. 7, Chap. 134, Laws 1907, and their subsequent amendments prior to the codification, it will be observed that they are harmonious and that an entirely different thing was intended by the words "tract" *and* "property". As these two provisions now appear in the code, wherein assessments are made upon "tracts *and* property", but the apportionment upon which the assessments are made is "tract *of* property", they are absolutely inharmonious. Correcting this typographical error in Sec. 8463 to read as it should read, Sec. 8463 as here applicable reads as follows:

> "After the establishment of the drainage * * the Board * * shall *fix* the *proportion* of benefits * * among the lands affected * *. The *proportion* of benefits which any county, city, town or township may obtain * * to highways or otherwise, and the benefits which any railroad company may obtain for its property * * shall be fixed * * *together with* the proportion of benefits to tracts of land."

A notice is required by this section, which:

> "Notice shall state * * a description of each "*tract* of land affected * * and the *proportion* of benefits fixed for each tract *or* property, taking any particular tract as a unit, and shall notify *all such owners* to show cause why the

proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the *proportion* of benefits the Board shall finally equalize and fix the same according to benefits received." (R. 30-31).

The natural as well as the statutory required sequence of acts which the Board shall take under this section is (1) fix the tentative proportion of benefits; (2) give notice of hearing on equalization; (3) equalize the tentative proportion of benefits; (4) finally fix the proportion of benefits as equalized.

When the law requires a notice which shall contain the decision of the Board on the proportion of benefits fixed by them for each tract *or* property, necessarily such law directs the Board to take such precedent acts and to make such decisions prior to the notice. Hence the Board is directed to fix "the *proportion* of benefits for each tract *or* property, taking any particular tract as a unit", and it is provided in this section that thereafter the Board shall "notify *all* such owners (of both "tracts" and "properties") to show cause why the *proportion* of benefits shall not be fixed as stated."

Thus it will be seen that the Board is directed to apportion the benefits to each of these separate taxable classes, namely, to tracts of land and to properties, and that subsequent to the first act, namely, fixing the tentative apportionment of benefits, this section requires a notice of equalization to be given by publication and posting, which notice, so far as the tracts of land are concerned, requires a description of each tract affected, the name of the owner

thereof, and the proportion of benefits fixed therefor; that so far as the other property owners are concerned, the statute requires their names and the proportionate amount fixed against each. As can readily be seen, the requirement of a specific description of the latter's property is not necessary, as the tax never becomes a lien upon the same and is a personal tax only, but he, like the owner of the tract of land, receives the same notice, which the law provides "shall notify all such owners (of both tracts and properties) to show cause why the *proportion* of benefits shall not be (finally) fixed as stated." Upon this hearing of "the equalization of the *proportion* of benefits", the Board finally equalizes and fixes (not fix and equalize) the same according to benefits received. *Milne v. McKinnon*, 32 S. D. 627, 632; *State v. Risty*, (S. D., 1927), 213 N. W. 952, 958; *Curtis v. Pound*, 34 S. D. 631, 633.

Thus it will be seen that this section of the statute requires the same notice to railroads as to owners of tracts of land and that such notice is required and given before the equalization hearing and before the final fixing of the apportionment prior to making assessment.

Again, looking at the statute from a different angle, it will be observed that the apportionment made to "tracts" *and* "properties" "shall be fixed and equalized (not equalized and fixed) *together with* the proportion of benefits to tracts of land." Now if the Board fixes the proportion of benefits "together with" the proportion of benefits to tracts of land, such fixing must have been at the same moment of time, because the words "together with" here mean "in union with", or "at the same moment

of time", "simultaneously", "contemporaneously" (8 Words and Phrases 6992); and if done at the same moment of time or simultaneously with the proportion of benefits to lands, then such fixing was done before giving of the notice to "all such owners" to show cause "why the proportion should not be fixed as stated."

Then if the Board equalizes such proportion of benefits "together with" the proportion of benefits to tracts of land, that again means at the same moment of time, and *after* notice and opportunity of hearing thereon, as provided for the owners of tracts of land.

The statutory requirement with reference to said fixing of benefits and equalization thereof received by railroad companies has the same limitation as is placed upon tracts of land and county, city, town or township, as it is provided that the same must be done "together with" the proportion of benefits to tracts of land. That again means that the fixing must be done at the same time as the fixing against tracts of land, and that is clearly *before* the notice is given to "all such owners", and the equalization comes *after* such notice and at the hearing given pursuant to such notice.

The words of the statute considered in the light of their definitions (both literary and legal) and the natural as well as statutory sequence of acts directed, forbids any other construction than that the intention of the legislature was that the tentative proportion of benefits which the statute directs shall be fixed against municipalities and railroad companies should be fixed *at the identical time* and

at the same sitting that said proportions are tentatively fixed against tracts of land, that is, before the notice of equalization hearing is given, and the equalization against said classes of persons is to be made at the same time and sitting as the final equalization against tracts of land, and this the statute clearly shows is *after* notice and opportunity to be heard.

We have now attempted to point out that this drainage law directs an assessment upon two different taxable classes, namely, *tracts of land* and *property,* and that as to the former, the assessment when made, becomes a lien, and as to latter properties, the assessment, when made, is only a personal tax and is collected by the statutory method provided therefor; that the apportionment likewise is made upon these same two separate taxable classes, and that notice is required to be given to each of such classes, who may show cause why the proportion of benefits tentatively allotted to them should not be finally fixed as stated in the tentative allotment, and that such fixing to each of these classes is done at the same time and prior to said notice; that an opportunity of contesting these tentative proportions of benefit is given to each of these two classes upon the hearing on equalization. But appellant further insists that the law is defective because as is said (P. 34, Appellant's Brief), it provides that the Board shall determine the proportion of benefits to land owners and benefits to a railroad company. We have already shown, we believe, the fallacy of this contention in our analysis already given.

However, we will give a further suggestion to help clarify this situation.

It must be kept in mind that there is a vast difference between "actual benefit" and "assessed benefit". The former is the total actual benefit to the real estate or property affected, the method of determining the number of units of such we have hereinbefore explained (page 53, supra); while the "assessed benefit" is that proportion of the total actual benefit which is assessed against the specific tract or property considered, which has been determined by mathematical calculation is necessary to raise the total amount of the costs of construction of such drainage project, and is arrived at as follows: After having determined the number of units of actual benefit to the separate tracts and properties in the drainage assessment area, the same are then added together. In this case there appear to be some over 32,000. The total cost of the project is then determined, and this total cost is divided by the total number of units of actual benefit, giving as a quotient the assessed value of the unit. This assessed value of the unit is a proportional benefit and may be any amount up to the actual benefit to the unit, but never to exceed the actual benefit.

Now appellant claims that Sec. 8463 directs the fixing of the "benefit" to a railroad company and the fixing of the "proportion of benefit" to tracts of land. (Appellant's Brief, page 35). If this were true, then Sec. 8464 is meaningless, because it says:

> "After the equalization of the proportion of benefits, the Board may make an assessment

against each tract *and* property affected, in *proportion* to the benefits as equalized."

Why provide for the Board to make an assessment "against each tract *and* property affected, in *proportion* to the benefits as equalized" if, as claimed by appellant, the actual benefits were already fixed to the railroad company? How could this be done in any event, where it is directed by this section that the assessment is only made against property benefited in "proportion" to the benefits as equalized?

Again, we have already shown that this law places the county, city, town or township in the same class or category of taxable entities as a railroad company, and Sec. 8463 clearly directs the Board to fix "the *proportion* of benefits against any county, city, town or township."

Viewing the same matter from yet another angle and again exhibiting this distinction, it will be seen that this section when naming that which is benefited, for which an apportionment is to be made and an assessment thereafter by the next section ordered, as to real estate in general says "lands affected"; as to the county, city, town or township, it says benefits to "highways or otherwise"; but when it comes to railroads it says benefits "which (it) may obtain *for its property,*" and does not limit the benefits to the railroad right of way or to its line of rails or to its station or station grounds or to its bridges or culverts, but says all of its property.

Upon the foregoing analysis, appellees respectfully contend that the statute clearly directs the fix-

ing of a proportional benefit against railway companies in the same manner as it directs the fixing of a proportional benefit against counties, cities, towns or townships, and also tracts of land, and that it likewise directs the giving of notice of equalization to railways in the same manner as it directs the giving of such notice to counties, cities, towns or townships and owners of tracts of land, as "all such owners." To this must be added the fact that there is nothing in the statute to indicate the intention of the law-making body to cause a different apportionment to be made against railroads than is made against an owner of a tract of land on any county, city, town or township. In fact, the exact opposite is evidenced throughout the statute, and the statute clearly indicates that the apportionment to railroads is a proportionate apportionment of benefits, the same as is apportioned to the other taxable entities.

This Court, in the case of *Hawaii vs. Mankachi*, 190 U. S. 197, 212, 213, in discussing the matter of construction extensively, points out former pronouncements, thus:

> "A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter. The intention of the law maker is the law."

And another parallel, thus:

> "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not

> within the statute unless it be within the intention of the makers."

Again, in the case of *U. S. vs. Katz,* 271 U. S. 354, 357, speaking through Mr. Justice Stone, this Court said:

> "All laws are to be given a sensible construction; and a literal application of the statute which would lead to absurd consequences should be avoided whenever a reasonable application can be given to it consistent with the legislative purpose."

Applying the foregoing reasonable rules to the situation here presented, we have a law that does not violate the Fourteenth Amendment to the Federal Constitution, even as to municipalities or railroads. Appellees respectfully submit that a reasonable and sensible construction applied to this statute dictates that the benefits to all persons affected, whether they are owners of tracts of land, municipalities or railway companies, are directed to be apportioned proportionately, and each and all are given notice and opportunity to be heard before their respective apportionments are finally equalized and fixed.

That the notice required by the statute and given meets all the requirements of the due process of law clause is as equally true to this notice as it is to the other given for the establishment of the ditch. (See cases cited pages 51-52, supra).

For which reasons appellees respectfully contend that the South Dakota drainage statute is not in violation of the Fourteenth Amendment to the Federal Constitution.

IV.

THE STATUTE DOES NOT REQUIRE ASSESSMENT FOR COST WITHOUT REGARD TO THE RELATION OF BENEFIT TO COST.

Appellant, under its fourth point, pages 36 to 39 of its Brief, contends that the law is defective because it does not provide for a determination that the costs of the drainage will not exceed the benefit to be derived, and give a notice and hearing upon the proposition.

(A). If by this appellant means the total costs and the total benefit, it is in error.

Our argument on appellant's first contention, (pages 37-47, supra), is equally applicable to the situation here presented by appellant. The Federal Constitution assures to appellant no hearing upon the total costs and total benefits. In the case of *Dunn vs. Fort Bend Co.*, 17 Fed. (2d) 329, 333, tried before a three-judge court, that Court said:

> "The Fort Bend County road district was valid under the state laws and is still valid under those laws. It was authorized to operate as a district levying and collecting taxes and issuing bonds, and still may do so in all respects and against all persons, except *in a case in which some individual is in a position to claim that he has a right, under the Fourteenth Amendment, to claim relief.* These general considerations we think sufficient, without others, to defeat plaintiff's suit, for even if the facts showed *that there are some persons in the district in a position to defeat the tax as to them,*

this would not be sufficient to authorize plaintiffs to rescind their contact and recover back money which they had voluntarily paid. There are other considerations, however, which make it more clear that plaintiffs present no equity whatever for relief. The first of these is that the invocation of the Fourteenth Amendment is a privilege; the fact that a statute may be obnoxious to the Fourteenth Amendment *as to a particular person* does not mean at all that it may be so as to another; and that this right to invoke the Fourteenth Amendment, being a personal privilege, may be lost by election, waiver or estoppel."

From the foregoing it is apparent (1) that appellant must bring himself within the class of persons protected by the constitutional provision; (2) that he can complain of that which affects himself personally; how the law affects someone else is none of his concern nor can he raise that question. Therefore he can only be concerned with the total cost as to himself and the total benefit as to himself, and of this alone can he complain.

In the case of *Ross vs. Board,* (Iowa, 1905). 104 N. W. 506, 510, that Court said:

"In the case before us there is, under the statute, ample provision for notice to every land owner and opportunity given for the hearing of all objections *he* may have to assert against the validity and justice of the proposed charge against *his* property. This, under the law, is all he can rightfully ask."

In the case of *Voight vs. Detroit*, 184 U. S. 115,

122, wherein it was claimed that the act was bad because it did not limit the total assessment of the district to the amount of its benefits, the same as is suggested in the case at bar, and wherein this court in discussing the law, said that it provided for the formation of a district in the vicinity of the proposed improvement, the limitation of the district to be determined by the benefits derived from the improvement, and further provided that the council should determine what proportion of the costs should be assessed upon the owners of the real estate benefited, and said:

> "It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law, and such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to *test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone can he complain.*"
>
> *Spencer v. Merchant,* 125 U. S. 345, 356.
> *Soliah v. Heskin,* 222 U. S. 522, 524.

Appellees therefore respectfully assert that the Federal constitutional provision concerned here affords appellant no right to a notice and hearing upon what shall be or is the total cost and total benefit of the drainage project. He is and can be concerned only with the total benefit as to himself and the total amount that he will be compelled to pay for such benefit, and we have already shown

herein that he is given a notice and hearing and an opportunity to be heard upon those questions.

(B). If, on the other hand, appellant intends to raise the question that it has not had the opportunity of determining the cost as to it in relation to the benefit which it receives, then appellees assert that that argument has already been hereinbefore answered and disproved. (Pages 52-54, supra).

We further respectfully show that R. C. Sec. 8469 (R. 36), concerning appeal from the determination of the board at its hearing on apportionment of benefits, reads:

> "Upon an appeal from an assessment of benefits, the Court or jury shall consider * * * * the question as to whether the *tract* taken as a *unit* is benefited or not, and if benefited, to what extent."

This same issue may be presented before the Board of County Commissioners at the hearing upon equalization. *State vs. Risty,* (S. D., 1927), 213 N. W. 952, 957; *In re Drainage Ditch No.* 12, 44 S. D. 157, 160. The hearing provided by Sec. 8463 R. C., after due notice affords appellant ample opportunity to determine the relation of the assessment made against its property to the benefits received by it.

But appellees assert that appellant is not in a position to urge this argument in the present case.

This court, in the case of *Standard Stock Food Co. vs. Wright,* 225 U. S. 540, 550, said:

> "One who would strike down a state statute

> as violative of the federal constitution must bring himself by proper averments and showing, within the class to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the federal constitution." (Citing several decisions of this Court).

Appellees contend that appellant nowhere makes proper averments in its bill and makes no showing whereby appellant exhibits that the assessment, per unit, to it, is greater than the benefit to the unit, and until such averment and showing is made, appellant is not in a position to present and argue in this court the question of the relation of the cost per unit to the benefit per unit.

We have hereinbefore shown the method pointed out by the statute and employed in making apportionments and assessments. (See pp. 53 and 75, supra). We have also hereinbefore shown what issues can be raised upon the equalization hearing. (See pp. 53 to 55, supra). And appellees concede that the assessed benefit per unit cannot be greater than the actual benefit per unit, and respectfully assert that this particular point must be reached by a protestant by taking advantage of the statutory provision permitting him to question the actual benefit to the unit, fixed thereon by the Board in accordance with this statute; and that if such protestant does not controvert the value of actual benefit placed by the Board in the exercise of its best judgment upon the tract selected as a unit, then such protestant cannot thereafter claim or as-

sert that his assessment per unit is greater than the benefit per unit.

Turning now to appellant's bill of complaint, appellees assert that appellant nowhere in its bill, by any proper averment or showing, attacks the value of the actual benefit placed upon the tract taken by the Board as a unit; that is, it nowhere questions the "yardstick of measurement". In Paragraph 23 (R. 19), appellant says that no benefits have accrued to the appellant railway company, but if this be conceded to be true, the most that can be said is that the Board has made a mistake. In Paragraph 26 (R. 23), appellant says that the apportionment set forth in Exhibit "C" against appellant was made by the Board without any reasonable or rational basis therefor, and not in proportion to any benefit which the property of appellant has ever received or ever can receive "by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2," and "that the property of appellant has not and never can be benefited by the work performed by the Board, as therein set forth, to the extent of $26,000.00 or to any extent whatever", and "that the assessment sought to be made upon property of appellant, as above set forth, is out of all proportion to assessments sought to be levied upon and collected from agricultural lands."

In none of the foregoing allegations does appellant reach the point here presented. All that is said therein is that the Board were mistaken, and this is far from saying that appellant's assessment, per unit, is greater than the actual benefit to the "unit." Again, it will be observed that all of the

foregoing allegations refer to Drainage Ditch No. 1 and Drainage Ditch No. 2. In this connection we call the Court's attention to the admissions made by appellant in the 11th, 12th and 13th paragraphs of its bill of complaint (R. 8, 9, 10), wherein appellant admits that the present project here in controversy is in fact repair and maintenance of Ditch No. 1 and Ditch No. 2. Ditch No. 2 was completed about 1912 and appellant stipulated and paid its admitted just proportion of the cost thereof, or $8,500.00, on April 8, 1912 (R. 127, 131), by which act appellant admits that it received benefits from said old ditches.

Not having brought itself, by proper averments or showing, within the class protected by the constitution — that is, having neither alleged nor shown that the assessment, per unit, is greater than the actual benefit to the unit — in no manner taking issue with the amount of actual benefit placed on the unit — and it affirmatively appearing from the record that appellant admitted a benefit of $8,500.00 by reason of the construction of Drainage Ditch No. 2, by its payment of its assessment in that sum upon the construction thereof, the question of whether the assessment, per pnit, to appellant is greater than the benefit to the unit is not now before this court.

(C). Appellant suggests that the drainage law fixes no limitation as to the amount of assessment that may be made. Sec. 6 of Art. 21 of the state constitution (See Appendix A, infra), provides:

> "The drainage of agricultural lands is hereby declared to be public purpose and the legis-

> lature may provide (for the payment thereof) * * * by special assessments upon the property benefited thereby, according to benefits received."

It will first be noticed that this provision makes no restriction or limitation upon the kind of property that may be assessed, using the broad term "property"; but it does make a restriction and limitation on the amount of the assessment, namely, that the same shall be *"according to benefits received."* The words *"according to"* are defined by Webster's dictionary as meaning "consistent with, in conformity with". See also *Dealy vs. United States,* 152 U. S. 539, 546. In the case of *State vs. Cunningham,* (Wis., 1892), 53 N. W. 35, it is said at page 56:

> "The provision of Section 3 for an apportionment '*according* to the number of inhabitants' is the exact equivalent of the provisions of the ordinance of 1787 of '*proportionate* representation of the people in the legislature'."

This restriction imposed by the constitution is equivalent to a limitation of *within and in proportion to the true benefit received,* because if property received no benefit necessarily there could be no assessment, and if property received some benefit, then the assessment must not exceed the value of the benefit, for an assessment of more than the value of the benefit would not be "proportionate" to or "in conformity with or consistent with" the benefit received. To assess beyond the amount of the benefit received would (to the extent of the excess) be assessing property not benefited.

This Court, in the case of *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727, 732, made this pronouncement:

> "As the clause in a constitution and the act of the legislature relate to the same subject, like statutes *in pari materia*, they are to be construed together."

By reading the foregoing provision of the state constitution as a part of the drainage statute, we have a specific restriction that the assessment shall not exceed the actual or true benefit received. At the equalization hearing (R. C. 8463, R. 30), the law provides that the Board shall, after equalizing the apportionment, "(finally) fix the same according to benefits received." Again the phrase "according to benefits received" carries the same interpretation and the same limitation as it does in the constitution, and the assessment only comes after the apportionment has been made, equalized and finally fixed "according to the benefits received", so that the final fixing is not only according to benefits received, but is an equalized fixing. Now the assessments made (R. C. 8464, R. 31) are made against each tract and property affected "*in proportion* to the benefits as equalized", which "benefits as equalized" were made with the limitation and interpretation above given, "according to benefits received."

Hence appellees contend that there is no merit in appellant's fourth contention.

CONCLUSION.

If the parties hereto had not secured an adjudication of the issues here involved in a previous suit between them in all the federal courts, the question of conflict between this court and the state supreme court, stressed in appellant's brief, might be of more consequence; but where the foregoing conditions exist, and there has been established by the former adjudication of this court, between these same parties, certain facts and "law of the case" then such conflict is not here involved. If the questions presented in this suit were presented by another appellant against these appellees, and the decisions of this court and the state supreme court conflicted, then this court would accept and follow the construction placed upon the state statutes by the state court, regardless of whether this court approved such construction or not, and this court has not hesitated, when there has been such a conflict between it and a state court, to overrule its own previous decisions and follow the state decision. (*Edward Hines Yellow Pine Trustees vs. Martin,* 268 U. S. 458, 464, and cases there cited). But inasmuch as it has been established by this court, in a prior action between these same parties, wherein the same constitutional questions were raised, and it was found and determined that the drainage law of South Dakota was constitutional and the work done and performed upon the present project here in controversy was merely maintenance and repair work upon the previously established drainage, such decisions and findings become the settled law of the case as between these parties, and that part of the state decision conflicting with this court's determi-

nation, as between these parties, has no bearing upon this case.

For all the foregoing reasons appellees respectfully submit that the three-judge court properly denied appellant's petition for an interlocutory injunction.

Respectfully submitted,

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Appendix B

SOUTH DAKOTA REVISED CODE, 1919.

PART 9. ASSESSMENT AND TAXATION.

CHAPTER 2.

PUBLIC UTILITIES.

ARTICLE 1.

RAILROAD COMPANIES.

Sec. 6606. COLLECTION, HOW MADE AND ENFORCED. All laws relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this article, and whenever any taxes levied under the provisions of this article shall become delinquent, the county treasurer having control of such delinquent taxes may proceed to collect the same in the same manner and with the same right and power as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or any rolling stock for collection of such taxes.

ARTICLE 7.

COLLECTION OF TAXES.

Sec. 6662. CIVIL ACTION TO COLLECT, PROCEDURE. In case any railroad company, telegraph company, telephone company, express company, sleeping car company, private car line company, or other company or corporation coming within the provisions of this chapter, shall refuse or

neglect, for a period of thirty days after the same shall have become delinquent, to pay any tax levied against it, the state or county treasurer to whom such tax is payable shall have the power, in addition to other remedies provided by law for the collection of personal property taxes, to institute and maintain an action in the circuit court, in his name as such treasurer, against such company to collect the tax, with penalties and interest as provided by law. In any such action it shall be sufficient for the treasurer to allege in his complaint that the taxes stand charged upon his books against such company and the same are due and unpaid, and that a debt is thereby created, and that such company is indebted in the amount appearing to be due on the treasurer's books. The treasurer's books shall be received as prima facie evidence, on the trial of the action, of the amount and validity of such tax appearing due and unpaid thereon, and of the nonpayment of the same. If on the trial of the action it shall be found that such company is so indebted, judgment shall be rendered in favor of the treasurer prosecuting such action for the taxes, penalties and costs as in other actions. The defendant may set up by way of answer any defense which it may have to the collection of such taxes. If the defendant claims the tax to be void, the court must in the action ascertain the just amount of taxes due for the year it is claimed the taxes are delinquent, and if, in its opinion, the assessment or any subsequent proceeding has been rendered void or voidable by the omission or commission of any act required or prohibited, the court shall order it re-assessed by the tax commission, and shall thereupon render judg-

ment for the just amount of taxes due from the defendant for that year or years.

Sec. 6663. SPECIAL ASSESSMENTS, PROCEDURE. If any railway company shall neglect or refuse to pay any special assessment levied against such railway company, the county treasurer, city treasurer, or other officer charged with its collection, whenever such special assessment shall become delinquent, shall collect the same by seizure of engines, cars, rolling stock, and any personal property of such company, in an amount sufficient to pay such special assessment, with accrued penalty and interest and all accrued costs, wherever the same may be found in the county or counties in which such special assessment may have been made and levied, and shall immediately proceed to advertise the same for sale in three public places in the county, or by advertisement in one of the newspapers published in the county where such property is taken, for a period of at least ten days before such sale, stating the time when and place where such property will be sold. And, if the special assessment or assessments for which such property is distrained, and the accrued costs thereon, are not paid before the day appointed for such sale, such treasurer shall proceed to sell such property at public auction, or so much thereof as shall be sufficient to pay such special assessment, penalty and cost of such seizure and sale. Any surplus remaining above the special assessment or assessments, charges for keeping, fees for sale, fees for levying on the property and mileage, as allowed by law, shall be returned to the owner; and the treasurer shall, on demand, render an account in writing of the sale and

charges. If the property so distrained and seized cannot be sold for want of bidders, the treasurer shall return a statement of the fact, and return the property to the possession of the railway company from which the same was taken and such tax shall be returned as unpaid.

Sec. 6664. GENERAL TAX PROVISIONS APPLICABLE. The provisions of this code relating to general taxes shall apply to the enforcement and collection of any delinquent special assessment against a railway company, so far as such provisions are applicable, and wherever in this code reference is made to general taxes, the same shall be construed to include special assessments, as well as taxes for general purposes.

Sec. 6665. APPLICATION TO PAST AND FUTURE ASSESSMENTS. This article shall apply to the enforcement and collection of all delinquent special assessments or taxes that may have hertofore become delinquent, as well as to all special assessments or taxes which shall hereafter become delinquent.